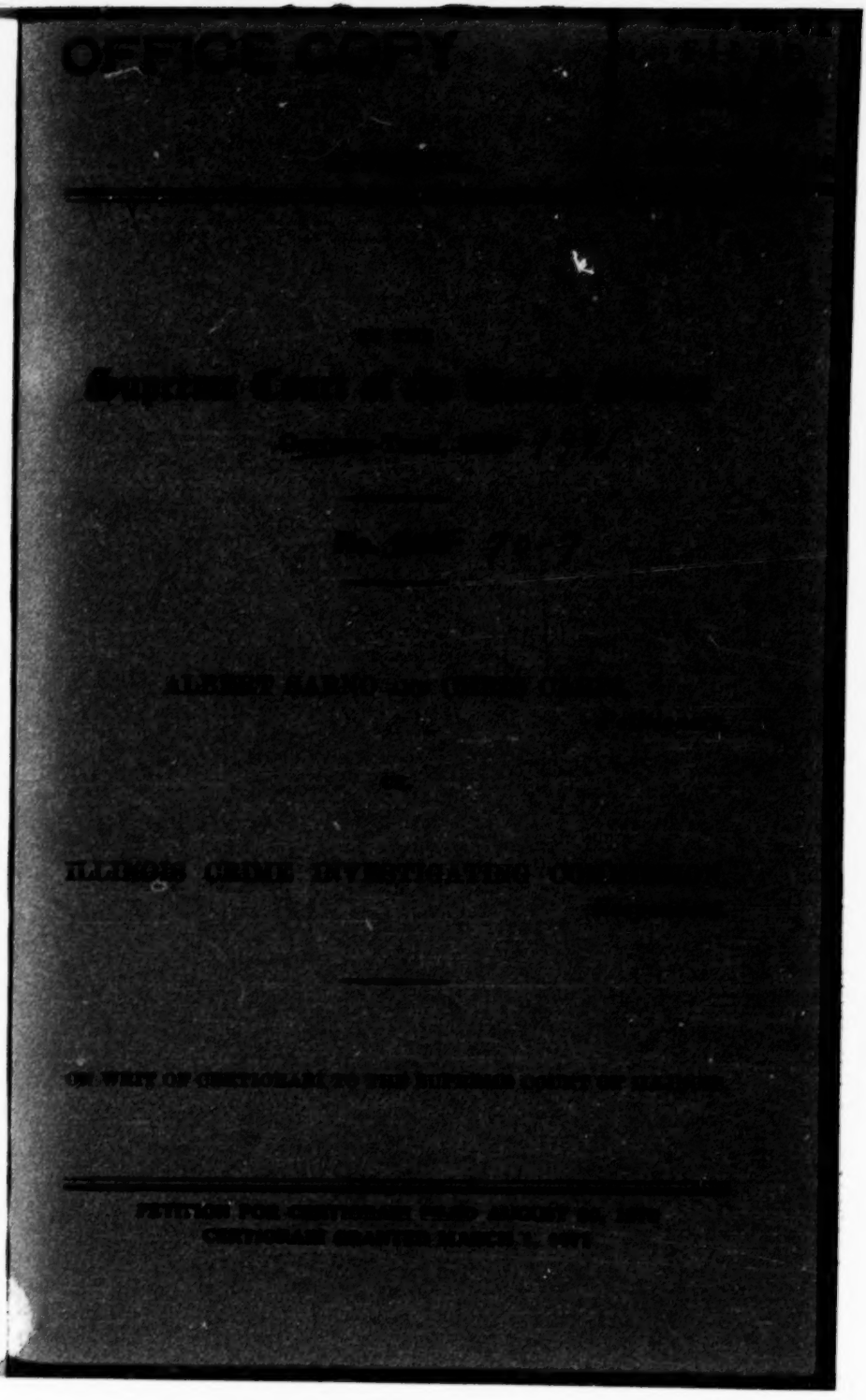

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 565

ALBERT SARNO AND CHRIS CARDI,
Petitioners,
vs.
ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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[3-53] On January 20, 1966, Plaintiff-Petitioner, Illinois Crime Investigating Commission, filed a Petition in the Circuit Court of Cook County, Illinois, County Department—Law Division, No. 66 L 1111, entitled *Illinois Crime Investigating Commission* v. *Fiore Buccieri, Chris Cardi, Patsy Ricciardi, Albert Sarno et al.*, alleging that the Illinois Crime Investigating Commission was created by an Act of the General Assembly of the State of Illinois with powers and duties provided in Chapter 38, Sections 203-1 through and including 203-17; that the legislative intent, relative to the Act was (a) to set up adequate facilities for investigating and establishing the facts and general background relating to organized crime and to individual crimes insofar as they have a bearing on organized crime, whether the act or intent constituting the same, or both, occurs within or without the State so long as such organized crime or individual crimes affect the public safety, public peace, public health, public morals, public welfare or public justice of the State; (b) to evaluate the extent to which organized crime exists within the borders of the State, and the degree of efficiency of law enforcement agencies in dealing with it; and (c) to make such facts, general background and evaluation available to the legislative, executive, judicial and administrative bodies and officials of the State, to the end that they may better perform their respective functions in preserving the public safety, public peace, public health, public morals, public welfare and public justice of the State; that pursuant to the Act, defendants, including Chris Cardi and Albert Sarno, were

served with subpoenas to testify before the Commission; that the Commission had adopted Specific Resolution No. 8, wherein it was stated that it was the purpose of the Commission to (1) investigate and establish the facts and general background relating to organized crime and to individual crimes, insofar as they may have a bearing on organized crime; and (2) to evaluate the extent to which organized crime exists within the borders of the State of Illinois and the degree of efficiency of law enforcement agencies in dealing with it and to make such facts, general background, and evaluation available to the General Assembly for the purpose of future legislation if the same should be deemed advisable; and said Resolution further resolved that the Commission would conduct public hearings "for the purpose of determining the extent to which organized criminal elements are involved in the County of Cook, in the State of Illinois, in the 'loan shark' or 'juice' racket, and related events and 'persons' as defined in Chapter 38 Ill. Rev. Stat. Section 842, according to the powers set forth in Chapter 38 Ill. Rev. Stat. Sections 848 through 854."

The defendants were ordered to appear before the Commission and refused to appear. They appealed this order to the Supreme Court of Illinois.

[67-68] On January 19, 1967, in the following entitled cause: *Illinois Crime Investigating Commission, Appellee* v. *Fiore Buccieri, Frank Buccieri, Chris Cardi, Dominick Carzoli, Arthur Cowan, Joseph Gagliano, Joseph Grieco, Peter Ori, Lenny Patrick, Patsy Ricciardi, Albert Sarno, and Anthony Spilotro,* the Illinois Supreme Court affirmed the trial court and ordered that the cause be remanded to the Circuit Court of Cook County to enable it to direct defendants' appearance before the Commission on such future date as

may be appropriate. Decision reported at 36 Ill. 2d 556 (1967).

[78-84] On February 8, 1968, pursuant to notice, the presiding judge of the Circuit Court entered an order requiring Defendants, Chris Cardi and Albert Sarno, to appear and attend before the Illinois Crime Investigating Commission on February 24, 1968. (Title omitted in printing.)

On February 24, 1968, the defendants appeared before the Commission and the following questions were propounded and answered:

[93] INTERROGATION OF CHRIS CARDI.

Mr. O'Connor: Q. Mr. Cardi, what is your address?

A. 2025 North 77th Court, Elmwood.

Q. Elmwood Park, Illinois?

A. That's right.

Q. What is the date and place of your birth?

A. I refuse to answer, I refuse to testify on the grounds that I might incriminate myself.

Q. What is your present occupation?

A. I refuse to testify on the grounds that I might incriminate myself.

[94] Q. Are you married?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you have any children?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Were you with the Chicago Police Department from April 1, 1958, through May 9, 1962?

A. I refuse to answer on the grounds that I might incriminate myself.

Q. Have you ever been arrested?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Were you arrested on December 9, 1963 by the Chicago Police Department on charges of kidnapping and assaulting a taxicab driver, Joseph Weisphal?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Was your actual occupation, from 1963 to the present time, juice collector or enforcer?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Was your principal employer at that time Willie Messino?

[95] A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you also work as a juice collector for Joseph Gagliano?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you know Jackie "The Lackey" Cerone?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Is he over or under Willie Messino in the juice racket?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Does Joseph Gagliano have any business connection with you?

A. I refuse to answer on the grounds that I might incriminate myself.

Q. As a matter of fact, from 1963 to 1966, didn't you make juice collections from over one hundred persons in the City of Chicago and County of Cook and State of Illinois?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did these payments include repayment of both
[96] principal and interest, or were the payments interest only?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. How much of the juice collections which you made during this period were retained by yourself and how much turned over to your superiors?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Were you present at the hearings that this Commission held in January of 1966 at which certain witnesses testified before the Commission concerning their payments of juice loans?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Were you present at the time that a witness identified as Mr. Boyd testified that he was introduced to you by the Grieco brothers, and that through you he obtained a juice loan?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Are you involved in a business organization known as the Yogi Bear Drive-ins?

A. I refuse to testify on the grounds that I might
[97] incriminate myself.

Q. Are your associates in that one Bruce Carman and one Leo Netzel?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Is Willie Messino a silent partner in that enterprise?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Are you picked up at your residence every morning by Joseph Gagliano?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you have any means of gainful employment at the present time?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you file an income tax return for the years 1964, '65 and 1966?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. With what office of the Internal Revenue Service did you file those returns?

A. I refuse to testify on the grounds that I might
[98] incriminate myself.

Q. Are you now or have you ever been connected with a business known as Moon's Sandwich Shop, located at Chicago and Hamlin Avenue? In Chicago?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Were these premises one of the collection stations which you maintained for picking up your juice loans?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Have you ever been connected in a business

fashion with Mr. Lucky's Tavern at 7800 Belmont, in Elmwood Park?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Was that one of your collection stations?

A. I refuse to answer on the grounds that I might incriminate myself.

Q. Did you also require some of your juice customers to meet you in the parking lot of that restaurant?

A. I refuse to testify on the grounds that I might incriminate myself.

[99] Q. Have you been connected with a business known as the Chicago Linoleum and Tile Company at 3816 West Chicago Avenue, in Chicago?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Was this one of your collection stops?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Was the Stefano's Restaurant, 2000 West Chicago Avenue, another of your collection stops?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you ever make collections of $200 a week from one Joseph Gillespie on a loan of $2,900?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you make collections from $2,000 a week from a person known as "Doc" on an original loan of $20,000?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you know Bruce Carman?

A. I refuse to testify on the grounds that I might incriminate myself.

[100] Q. Do you know Bruce Carman?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you collect $600 a month from him on a $7,300 juice loan?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you know Charles Tabbert?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you loan $7,000 to Charles Tabbert on or about February 21, 1963?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. How much money were you paid for your services as a collector?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Were you paid the sums by Willie Messino?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Were you paid these sums by Joseph Gagliano?

A. I refuse to testify on the grounds that I might incriminate myself.

[101] Q. Were you paid on a salary or commission basis?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. During the period January 1, 1963 to date what has been your gainful occupation?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Have you been frequenting the Bar Nazionale located on 3854 West Chicago Avenue?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you meet at that place with Joseph, Joe "Gags," Gagliano?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. In December of 1967 did you accompany Mr. Gagliano from that bar to the Garfield Park Community Hospital?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. What was the purpose of your visit to the Garfield Park Community Hospital at that time?

A. I refuse to testify on the grounds that I might incriminate myself.

[102] Q. A Mr. White testified at our previous hearings that he made several loans from Willie Messino which he had to pay interest of ten percent a week until he was able to pay the full principal in a lump sum. Mr. White further testified, in the transcript of our public hearings, that on some of the occasions when he made payment to Messino, Messino was accompanied by yourself and Albert Sarno. Is that true?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you know Albert Sarno?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Are you associated in any business venture with Albert Sarno?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Are you associated in any business venture with Fiore or "Fifi" Buccieref?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Are you associated in any business venture with Frank Buccieref?

A. I refuse to testify on the grounds that I might
[103] incriminate myself.

Q. Did you have any interest recorded or not recorded in the Vic Damone Pizza Company?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you have any business interest recorded or unrecorded in an organization known as the Independent Factoring Company?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Is there any question along the line of examination which we have pursued thus far that you would not feel constrained to claim your rights?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Have you been in the Armed Services of the United States?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Are you a United States citizen?

A. I refuse to testify on the grounds that I might incriminate myself.

Mr. O'Connor: I have no further questions at this time.

[104] Mr. Siraguso: Q. Mr. Cardi, do you know a man named Ray Finnerman, F-i-n-n-e-r-m-a-n?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you ever extend any loan to him?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did anyone ever ask you to collect money from him?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Did you know that he left his home in Skokie and went to Texas?

A. I refuse to testify on the grounds that I might incriminate myself.

Q. Do you know the reason why he went to Texas?

[105] A. I refuse to testify on the grounds that I might incriminate myself.

[123] INTERROGATION OF ALBERT SARNO.

Mr. O'Connor: Q. What is your present place of residence?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. When and where were you born?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate myself.

[124] Q. What is your present occupation?

A. I respectfully decline to answer on the grounds that my answer may incriminate me.

Q. Are you married?

A. I respectfully decline to answer on the grounds that my answer may incriminate myself.

Q. Do you have any children?

A. I respectfully decline to answer on the grounds that my answer may incriminate myself.

Q. Were you a member of the Chicago Police Department from February 16, 1958, to March, 1961?

A. I respectfully decline to answer on the grounds that I may incriminate myself.

Q. Did you resign from the Chicago Police Department or were you discharged after charges?

A. I respectfully decline to answer on the grounds that I may incriminate myself.

Q. Were you arrested by the Federal Bureau of Investigation on April 2, 1962, for theft from interstate shipments?

A. I respectfully decline to answer on the grounds that I may incriminate myself.

Q. Were you arrested on December 9, 1963, by the Chicago Police Department on charges of kidnapping,
[125] assault and robbery of one Joseph Weisphal?

A. I respectfully decline to answer on the grounds that I might incriminate myself.

Q. Were you a juice or usurous interest collector for Willie Messino?

A. I respectfully decline to answer on the grounds that I may incriminate myself.

Q. Did you make loans to various persons on behalf of Willie Messino and Joseph Gagliano?

A. I respectfully decline to answer on the grounds that my answer may incriminate me.

Q. Was it your practice to collect ten percent weekly interest on these loans?

A. I respectfully decline to answer on the grounds I may incriminate myself.

Q. Didn't you in fact make some loans on your own

without the approval of Mr. Messino and Mr. Gagliano?

A. I respectfully decline to answer on the grounds I may incriminate myself.

Q. Did you use as your collection headquarters Moon's Sandwich Shop, formerly located on Chicago and Hamlin Avenue, in Chicago?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

[126] Q. Are you still a juice collector for Willie Messino and Joe Gagliano?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. At what places in Cook County have your juice customers met you to make their weekly payments?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. Were you present at these hearings in January, 1966, when a witness, Mr. White, testified that he made juice payments to Willie Messino in your presence?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Were you present at these hearings when, as shown by the public record, the witness Mr. Black testified that he borrowed money from you directly and paid interest at the rate of $10 per hundred per week?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. At one time when Mr. Black became delinquent in his loan, did you visit his home and make certain threats and allegations to his mother, thereby frightening her?

[127] A. I respectfully decline to answer on the grounds that my answer may incriminate me.

Q. Did Mr. Black make his payment to you at Mr. Lucky's in the 7800 block west on Belmont, in Elmwood Park?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. On one occasion did you exhibit a pistol to Mr. Black and wave it under his face and say to him, "You know what will happen if you don't pay me on time?"

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. Did you make a loan to a Mr. James, who testified in the public hearings, that he borrowed money from you at eight percent per week?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. When he fell behind in his payments, did you then raise his interest to ten percent a week, and no credit on principal?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. Did you report to Willie Messino that Mr. James failed to make his payments on time?

[128] A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. When you made this report, did you then accompany Willie "The Beast" Messino to Mr. James's home and were you present at the time that Mr. Messino threatened Mr. James with a baseball bat?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. Is Mr. James still holding out from you as he testified here in these public hearings?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. Does your brother, Alfonse Sarno, own Mr. Lucky's Tavern or is he the licensee of that premises?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. Have you used the Red Steer Restaurant, at 8800 West Grant Avenue, River Grove, as a place to receive juice payments from your customers?

A. I respectfully decline to answer on the grounds my answer may incriminate me.

Q. Have you also used as a meeting place the cocktail lounge at the Flying Carpet Motel in Rosemont?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Have you met juice customers at Sam and Sleepy's Tavern at 3800 West Chicago Avenue?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Did you take your orders directly from Messino or from Joseph Gagliano?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. Do you know Jack "The Lackey" Cerone?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Are you employed by him in any way?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Have you been collecting $80 a week from one Ed Bach of Laverne Avenue in Chicago on an original loan of $480?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Were you formerly collecting $750 a month from one Larry Greenbaum on an original loan of $5,000?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

[130] Q. Did you know that Greenbaum was an ex-convict?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Did Greenbaum skip town to avoid his juice payments to you?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Were you collecting $100 a week from one Philip Marzarello on an original $1,500 loan?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Is it true that he has escaped from the City to avoid making further juice payments to you?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. Did you make a collection of $100 a week on principal and $100 a week on interest for 100 weeks from George and Peter Menenexis?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Do you know Mike Castaldo, who formerly owned the "One Step Beyond" tavern located at Grand Avenue and Oak Park Avenue in Chicago?

A. I respectfully decline to answer on the grounds [131] that my answer may tend to incriminate me.

Q. Did you know what Mike Castaldo had a criminal record?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. Do you know Joe Donzanelli?

A. I respectfully decline to answer.

Q. Was Donzanelli the liquor licensee of the "One Step Beyond" tavern?

A. I respectfully decline to answer.

Q. Did you collect a total of $2,200 on an original loan of $1,700 from Dave Wasserman of Birchwood Avenue in Chicago?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. Did you file an income tax return with the Federal Government for the years 1964, 1965 and 1966?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. What lines of gainful employment have you followed since you left the Chicago Police Department?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Q. Did you leave the Chicago Police Department as a result of the cleanup instigated by former Superintendent Wilson?

[132] A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. Are you presently under indictment or awaiting trial in any court of the United States or of this State?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Q. What office of the Internal Revenue Service have you filed your tax returns for the years previously mentioned?

A. I respectfully decline to answer on the grounds my answer may tend to incriminate me.

Mr. Siragusa: Q. Is there any person at all to which you would be responsible?

A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

[86-90] On March 21, 1968, the Commission filed a motion in the Circuit Court stating that Defendants, Chris Cardi and Albert Sarno, were ordered to appear and attend before the Commission on the 24th day of February, 1968, and that when they did appear at said hearing they refused to answer questions propounded to them upon the grounds that they believed that their answers might tend to incriminate them. The motion incorporated the questions asked and the answers given by defendants as exhibits. (Title omitted in printing.)

The motion moves the court to enter an order pursuant to Section 14 of the Illinois Crime Investigating Commission Act, approved June 20, 1963, as amended (Ill. Rev. Stat. 1967 Chap. 38 Sec. 203-14), and in accordance with the Illinois Immunity Act (Ill. Rev. Stat. 1967 Chap. 38 Sec. 106-1 through 106-3) releasing the said Chris Cardi and the said Albert Sarno from all liability to be prosecuted or punished on account of any matter to which he shall testify in the matter identified above before the said Commission, except for perjury or contempt of Court; and further moving the Court to order Chris Cardi and Albert Sarno to appear before the Commission and answer such questions as may be put to each of them, including but not limited to questions attached as exhibits.

[136] Letter from the United States Attorney to the Commission dated March 5, 1968, stating that the government had no effective basis for imminent prosecution of the defendants.

[141] March 21, 1968, order entered directing Defendants, Chris Cardi and Albert Sarno, to answer the

foregoing motion within twenty (20) days. (Title omitted in printing.)

[143] On April 9, 1968, defendants filed a motion to dismiss or in the alternative to strike as follows:

MOTION TO DISMISS OR IN THE ALTERNATIVE TO STRIKE.

1. These defendants have been advised by their respective attorneys that any order issued by this Court granting the defendants immunity is a void order and that if the defendants were to rely upon any formal order granting the defendants immunity that they would do so at their own risk of being prosecuted in the future because of the testimony they give or because their testimony gave leads to possible offenses for which they could be convicted.

2. That this Court does not have the power or authority and therefore does not have jurisdiction to grant immunity to the defendants under Chapter 38, Sections 203-13 and 203-14.

[144] 3. Chapter 38, Section 203-14 authorizes this Court to order a person "to answer the question or produce the evidence" and further provides that "he may nevertheless be prosecuted . . . of contempt committed in . . . failing to answer, or not producing, or failing to produce, evidence in accordance with the order." This statute grants no power for this Court to grant immunity.

4. The following excerpt from Chapter 38, Section 203-14: "that person shall not be prosecuted for or on account of any transaction, matter or thing which, in accordance with the order, he may have answered or produced evidence" violates the due process clauses of the Illinois State and Federal Constitutions in that it is incomplete, vague and indefinite in that men of ordi-

nary intelligence must guess at its meaning and differ as to its application. Further, the latter clause is not sufficiently explicit to advise everyone of his rights under the statute and how he will be affected by its operation and requires that the determination of whether because of his testimony he has in fact obtained immunity be decided by another Court at another time after the person has in fact already testified.

5. Chapter 38, Section 203-14 violates the self-incrimination clauses of the Illinois State and Federal Constitutions in that it compels a person to give testimony against himself and the purported immunity is only "on account of any transaction, matter or thing, which, in accordance with the order, he may have answered or produced evidence" and makes no provision for the "fruits of the poisonous tree."

6. • • •

[145] 7. • • •

8. • • •

9. Chapter 38, Section 203-14 further violates the self-incrimination clauses of the Illinois State and Federal Constitutions in that in any subsequent prosecution the burden would be placed upon the defendants to show that they previously testified before the Commission on a "transaction, matter or thing" and that they were being prosecuted "for or on account of" the foregoing. The defendants are thus deprived of a formal order of court granting immunity and would be subject to records of an administrative body being lost or destroyed.

10. • • •

11. • • •

[146] 12. Since, therefore, the Court can merely compel testimony and cannot grant immunity, the tests as set

down in *Malloy* v. *Hogan*, 378 U. S. 1, 84 S. Ct. 1489 (1964); *Hoffman* v. *United States*, 341 U. S. 479, 71 S. Ct. 818 (1951); and *People* v. *Burkert*, 7 Ill. 2d 506, 131 N. E. 2d 495 (1955) apply and should be used by the Court as the standards in interpreting the limits and extent of Chapter 38, Section 203-14.

13. In addition to the fact that Chapter 38, Section 203-14 does not authorize the granting of immunity, it further contains the identical prohibition as was contained in Chapter 38, Section 580a, Illinois Revised Statutes, 1953, the original immunity act in Illinois.

[147] 14. • • •

15. *People* v. *Burkert, supra,* reversed a decision of the Circuit Court of Lake County, Illinois, under the provisions of Chapter 38, Section 580a, Illinois Revised Statutes, 1953, which contains the identical prohibition of Chapter 38, Section 203-14, and, therefore, is still the law that applies in the instant case. The statute which the United States Supreme Court was interpreting in *Murphy* v. *The Waterfront Commission of New York Harbor, supra,* a copy of which is attached hereto and labeled, contains no such prohibition as the statute in question in this case.

[148] 16. The general immunity statute cannot apply since under the terms of Chapter 38, Section 106-1 there must be an investigation before a Grand Jury or trial in a court of record neither of which situation applies to the instant case as is evidenced by an examination of Petitioner's Exhibit C2 of Count I and C4 of Count I.

17. • • •

18. • • •

19. • • •

20. That Chapter 38, Section 203-14 was enacted into law at a time subsequent to the time Chapter 38, Section 106-1 was enacted into law. That Chapter 38, Section 106-1 specifically granted and provided for a formal order granting immunity. That the subsequent
[149] enactment into law of Chapter 38, Section 203-14 in which there is no provision for a formal order granting immunity is an acknowledgment by the Legislature that they did not intend that this Court have the power or authority to enter an order granting these defendants immunity.

WHEREFORE, Defendants Chris Cardi and Albert Sarno pray that the Petition in the above entitled cause be dismissed or in the alternative that the pleadings requesting the Court to grant immunity be stricken.

ANSWER.

Now come Defendants Chris Cardi and Albert Sarno by their Attorneys John J. Cogan and Frank G. Whalen answering the Petition in the event the motion to dismiss or in the alternative to strike be denied and state as follows:

Defendants repeat Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the motion to dismiss or in the alternative to strike and further state:

21. • • •

22. That there are in full force and effect certain statutes of the United States Government providing for criminal penalties for failure to file income tax or for wilfully and fraudulently understating a person's income.

[156-176] On April 22, 1968, the Commission filed a reply to the motion to dismiss or in the alternative to strike.

[179] Order entered April 23, 1968, stating that this matter, along with two (2) similar matters, would be heard en banc by Judge Healy.

[181] July 26, 1968, an order was entered denying defendants' motion to dismiss or in the alternative to strike and ordering defendants to answer the Commission's petition.

[204] On December 27, 1968, defendants filed their answer to the Commission's petition for an order granting immunity to the defendants as follows:

ANSWER TO MOTION FOR ORDER OF IMMUNITY.

* * * * *

AFFIRMATIVE DEFENSES RELIED UPON BY THE DEFENDANTS/RESPONDENTS CHRIS CARDI AND ALBERT SARNO.

Respondents repeated the same allegations contained in their previous motion to dismiss. (A. 19-22)

[218-220] On January 30, 1969, the Court on the motion of the Commission to grant the defendants immunity from prosecution as provided by Section 14 of the Illinois Crime Investigating Commission Act, entered the following order:

NOW THEREFORE THE COURT DOTH ORDER:

1. That the prayer of the Petition be and the same is hereby allowed and each of the said Respondents to-wit, Chris Cardi, Patsy Ricciardi and Albert Sarno is hereby ordered to be and appear before the said Commission on such date or dates and at such place or places as the said Commission may direct, provided that at least 5 days written notice be served upon their respective attorneys, and to then and there answer ~~*such questions and produce such evidence touching*~~

~~*upon the subject matter being investigated, as may be propounded to him, including, but not limited to*~~ the questions previously propounded to him, and attached to the petition.

(The order was prepared by the Commission. The striking was done by the trial court.)

2. The Court doth further order that each of the said Defendants/Respondents be and he is hereby released from all liability to be prosecuted or punished on account of any matter to which he shall testify before the said Commission, except for perjury or contempt of Court by the said Respondents/Defendants before the said Commission.

[245] Pursuant to the order entered on January 30, 1969, Defendant, Chris Cardi, appeared before the Commission on the 28th day of February, 1969, and the following questions were asked and answers given:

INTERROGATION OF CHRIS CARDI.

Mr. Flaum: Q. Mr. Witness, will you state your name, please?

A. I beg your pardon?

Q. Mr. Witness, will you please state your name?

A. Chris Cardi.

Q. Mr. Cardi, what is your address?

A. 2025 North 77th Court, Elmwood Park.

Q. What is the date and place of your birth?

A. I refuse to testify on the grounds that I might incriminate myself.

[246] Co-Chairman Laughlin: The Chair orders and directs you to answer that question, Mr. Cardi.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: You are aware, I am sure, and have been advised by your counsel of the possible consequences of your failure to answer these questions, is that correct?

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: Continue.

Mr. Flaum: Q. What is the date and place of your birth?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

1 Mr. Flaum: Q. What is your present occupation?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

[247] The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

2 Mr. Flaum: Q. Were you with the Chicago Police Department from April 1 through May 9, 1962?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

3 Mr. Flaum: Q. Mr. Witness, have you ever been arrested?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

4 Mr. Flaum: Q. Mr. Witness, were you arrested on December 9, 1963, by the Chicago Police Department on charges of kidnapping and assaulting a taxicab driver, Joseph Weisphal?

A. I refuse to answer on the grounds that I might incriminate myself.

[248] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

5 Mr. Flaum: Q. Mr. Witness, was your actual occupation from 1963 to the present time juice collector or enforcer?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

6 Mr. Flaum: Q. Mr. Witness, was your principal employer at that time Willie Messino?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

7 Mr. Flaum: Q. Did you also work as a juice collector for Joseph Gagliano?

A. I refuse to answer on the grounds that I might incriminate myself.

[249] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

8 Mr. Flaum: Q. Mr. Witness, do you know Jackie Cerone?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

9 Mr. Flaum: Q. Mr. Witness, is Mr. Cerone over or under Willie Messino in the juice racket?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

10 Mr. Flaum: Q. Mr. Witness, does Joseph Gagliano have any business connection with you?

A. I refuse to answer on the grounds that I might incriminate myself.

[250] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

11 Mr. Flaum: Q. Mr. Witness, is it a matter of fact that from 1963 to 1966 you made juice collections from over 100 persons in the City of Chicago and County of Cook and State of Illinois?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

12 Mr. Flaum: Q. Mr. Witness, did the payments from such loans include the payment of both principal and interest or were the payments interest only?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that my answer may tend to incriminate me.

13 Mr. Flaum: Q. Mr. Witness, how much of this [251] juice collections which you made during this period were retained by yourself and how much turned over to your superiors?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I may tend to incriminate myself.

14 Mr. Flaum: Q. Mr. Witness, were you present at the hearings of this Commission held in January of 1966, at which time certain witnesses testified before

the Commission concerning their payment of juice loans?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might tend to incriminate myself.

15 Mr. Flaum: Q. Mr. Witness, were you present at the time that a witness identified as Mr. Boyd testified that he was introduced to you by the Grieco brothers, and that through you he obtained a juice loan?

A. I refuse to answer on the grounds that I might
[252] incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

A. I refuse to testify on the grounds that I might incriminate myself.

16 Mr. Flaum: Q. Mr. Witness, are you involved in a business organization known as the Yogi Bear Drive-ins?

A. I refuse to answer on the grounds that I might tend to incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

A. I refuse to testify on the grounds that I may incriminate myself.

17 Mr. Flaum: Q. Are your associates in that enterprise one Bruce Carman and one Leo Netzel?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

18 Mr. Flaum: Q. Mr. Witness, is Willie Messino a silent partner of that enterprise?

A. I refuse to answer on the grounds that I may [253] tend to incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that might incriminate myself.

19 Mr. Flaum: Q. Mr. Witness, are you picked up at your residence every morning by Joseph Gagliano?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

20 Mr. Flaum: Q. Mr. Witness, did you file an income tax return for the years 1964, '65 and '66?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

21 Mr. Flaum: Q. Mr. Witness, are you now or have you ever been connected with a business known as Moon's Sandwich Shop, located at Chicago and Hamlin [254] Avenue, in Chicago?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

22 Mr. Flaum: Q. Mr. Witness, were these premises one of the collection stations which you maintained for picking up your juice loans?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

23 Mr. Flaum: Q. Mr. Witness, have you ever been connected in a business fashion with Mr. Lucky's Tavern at 7800 Belmont, in Elmwood Park, Illinois?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the questions, sir.

The Witness: A. I refuse to testify on the grounds
[255] that I might incriminate myself.

24 Mr. Flaum: Q. Mr. Witness, was that one of your collection stations?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

25 Mr. Flaum: Q. Mr. Witness, did you also require some of your juice customers to meet you in the parking lot of that restaurant?

A. I refuse to answer on the grounds that I might tend to incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

26 Mr. Flaum: Q. Mr. Witness, have you been connected with a business known as the Chicago Linoleum and Tile Company at 3816 West Chicago Avenue, in Chicago?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and di-
[256] rects you to answer the questions, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

27 Mr. Flaum: Q. Mr. Witness, was this one of your collection stops?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

28 Mr. Flaum: Q. Mr. Witness, was the Stefano's Restaurant, 2000 West Chicago Avenue, another of your collection stops?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the questions, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

29 Mr. Flaum: Q. Mr. Witness, did you ever make collections of $200 a week from one Joseph Gillespie on a loan of $2,900?

A. I refuse to testify on the grounds that I might
[257] incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

30 Mr. Flaum: Q. Mr. Witness, did you make collections of $2,000 a week from a person known as "Doc" on an original loan of $20,000?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

31 Mr. Flaum: Q. Mr. Witness, do you know a Bruce Carman?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

32 Mr. Flaum: Q. Mr. Witness, did you collect $600 a month from him on a $7,300 juice loan?

[258] A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

33 Mr. Flaum: Q. Mr. Witness, do you know a Charles Tabbert, T-a-b-b-e-r-t?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

34 Mr. Flaum: Q. Did you loan $7,000 to Charles Tabbert on or about February 21, 1963?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

35 Mr. Flaum: Q. Mr. Witness, how much money were you paid for your services as a collector?

[259] A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

36 Mr. Flaum: Q. Mr. Witness, were you paid the sums by Willie Messino?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

37 Mr. Flaum: Q. Were you paid these sums by Joseph Gagliano?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the questions, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

38 Mr. Flaum: Q. Mr. Witness, were you paid on a salary or commission basis?

[260] A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the questions, sir.

The Witness: I refuse to testify on the grounds that I might incriminate myself.

39 Mr. Flaum: Q. Mr. Witness, during the period of January 1, 1963 to date what has been your gainful occupation?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

40 Mr. Flaum: Q. Mr. Witness, have you been frequenting the Bar Nazionale located on 3854 West Chicago Avenue?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

41 Mr. Flaum: Q. Mr. Witness, did you meet at that
[261] place with Joseph, Joe "Gags," Gagliano?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

42 Mr. Flaum: Q. Mr. Witness, a Mr. White testified at our previous hearings that he made several loans from Willie Messino which he had to pay interest of ten percent a week until he was able to pay the full principal in a lump sum. Mr. White further testified, in the transcript of our public hearings, that on some of the occasions when he made payment to Messino, Messino was accompanied by yourself and Albert Sarno. Is that true?

A. I refuse to testify on the grounds that I might incriminate myself?

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

43 Mr. Flaum: Q. Mr. Witness, do you know Albert Sarno?

A. I refuse to testify on the grounds that I might incriminate myself.

[262] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

44 Mr. Flaum: Q. Are you associated in any business venture with Mr. Albert Sarno?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: I refuse to testify on the grounds that I might incriminate myself.

45 Mr. Flaum: Q. Mr. Witness, are you associated in any business venture with Fiore Bucciere?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

46 Mr. Flaum: Q. Mr. Witness, are you associated in any business with Frank Bucciere?

A. I refuse to testify on the grounds that I might incriminate myself.

[263] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

47 Mr. Flaum: Q. Mr. Witness, are you a citizen of the United States?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

48 Mr. Flaum: Q. Mr. Witness, do you know a man named Ray Finnerman, F-i-n-n-e-r-m-a-n?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

49 Mr. Flaum: Q. Mr. Witness, did you ever extend any loan to him?

A. I refuse to testify on the grounds that I might incriminate myself.

[264] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to testify on the grounds that I might incriminate myself.

50 Mr. Flaum: Q. Mr. Witness, did any one ever ask you to collect money from him?

A. I refuse to testify on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I might incriminate myself.

51 Mr. Flaum: Q. Mr. Witness, do you know that he left his home in Skokie and went to the State of Texas?

A. I refuse to answer on the grounds that I might incriminate myself.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: I refuse to testify on the grounds that I might incriminate myself.

52 Mr. Flaum: Q. Mr. Witness, do you know the reason why Mr. Finnerman went to Texas?

A. I refuse to testify on the grounds that I might incriminate myself.

[265] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that I may tend to incriminate myself.

[272] Pursuant to the order entered on January 30, 1969, Defendant, Albert Sarno, appeared before the Commission on the 28th day of February, 1969, and the following questions were asked and answers given:

INTERROGATION OF ALBERT SARNO.

Mr. Zagel: Q. State your full name, please?

A. Albert Sarno.

Q. What is your present place of residence?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Mr. Zagel: Q. When and where were you born?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

1 Mr. Zagel: Q. What is your present occupation?

A. I refuse to answer on the grounds that my
[273] answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

2 Mr. Zagel: Q. Were you a member of the Chicago Police Department from February 16, 1958 to March 1961?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

3 Mr. Zagel: Q. Did you resign from the Chicago Police Department or were you discharged after charges?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

4 Mr. Zagel: Q. Were you arrested by the Federal Bureau of Investigation on April 2, 1962 for theft from interstate shipments?

[274] A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Mr. Zagel: Q. Were you arrested on December 9, 1963 by the Chicago Police Department on charges of kidnapping, assault and robbery of one Joseph Weisphal?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Mr. Zagel: Q. Were you a juice or usurious interest collector for Willie Messino?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Mr. Zagel: Q. Did you make loans to various per-
[275] sons on behalf of Willie Messino and Joseph Gagliano?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Mr. Zagel: Q. Was it your practice to collect ten percent weekly interest on these loans?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

9 Mr. Zagel: Q. Didn't you in fact make some loans on your own without the approval of Mr. Messino and Mr. Gagliano?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

10 [276] Mr. Zagel: Q. Did you use as your collection headquarters Moon's Sandwich Shop, formerly located on Chicago and Hamlin Avenue, in Chicago?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

11 Mr. Zagel: Q. Are you still a juice collector for Willie Messino and Joe Gagliano?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

12 Mr. Zagel: Q. At what places in Cook County have your juice customers met you to make their weekly payments?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

[277] The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

13 Mr. Zagel: Q. Were you present at these hearings in January, 1966, when a witness, Mr. White, testified that he made juice payments to Willie Messino in your presence?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

14 Mr. Zagel: Q. Were you present at these hearings when, as shown by the public record, the witness Mr. Black testified that he borrowed money from you directly and paid interest of $10 per hundred per week?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

15 Mr. Zagel: Q. At one time when Mr. Black became delinquent in his loan, did you visit his home and make certain threats and allegations to his mother, [278] thereby frightening her?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

16 Mr. Zagel: Q. Did Mr. Black make his payment to you at Mr. Lucky's in the 7800 block west on Belmont, in Elmwood Park?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

17 Mr. Zagel: Q. On one occasion did you exhibit a pistol to Mr. Black and wave it under his face and say to him, "You know what will happen if you don't pay me on time"?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

[279] The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

18 Mr. Zagel: Q. Did you make a loan to a Mr. James, who testified in the public hearings that he borrowed money from you at eight percent per week?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

19 Mr. Zagel: Q. When he fell behind in his payments, did you then raise his interest to ten percent a week, and no credit on principal?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

20 Mr. Zagel: Q. Did you report to Willie Messino that Mr. James failed to make his payments on time?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

[279A] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

21 Mr. Zagel: Q. When you made this report, did you then accompany Willie Messino to Mr. James' home and were you present at the time that Mr. Messino threatened Mr. James with a baseball bat?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

22 Mr. Zagel: Q. Is Mr. James still hiding out from you as he testified here in these public hearings?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

23 Mr. Zagel: Q. Does your brother, Alfonse Sarno, own Mr. Lucky's Tavern or is he the licensee of that
[280] premises?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

24 Mr. Zagel: Q. Have you used the Red Steer Restaurant, at 8800 West Grand Avenue, River Grove, as a place to receive juice payments from your customers?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

25 Mr. Zagel: Q. Have you met juice customers at Sam and Sleepy's Tavern at 3800 West Chicago Avenue?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

26 [281] Mr. Zagel: Q. Did you take your orders directly from Messino or from Joseph Gagliano?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

27 Mr. Zagel: Q. Do you know Jack Cerone?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

28 Mr. Zagel: Q. Are you employed by him in any way?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness : A. I refuse to answer on the grounds that my answer may tend to incriminate me.

29 Mr. Zagel: Q. Have you been collecting $80 a week from one Ed Bach of Laverne Avenue in Chicago [282] on an original loan of $480?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

30 Mr. Zagel: Q. Were you formerly collecting $750 a month from one Larry Greenbaum on an original loan of $5,000?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

31 Mr. Zagel: Q. Did Greenbaum leave town to avoid his juice payments to you?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

32 [283] Mr. Zagel: Q. Were you collecting $100 a week from one Philip Marzarello on an original $1,500 loan?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

33 Mr. Zagel: Q. Is it true that he has escaped from the city to avoid making further juice payments to you?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

34 Mr. Zagel: Q. Did you make a collection of $100 a week on principal and $100 a week on interest for 100 weeks from George and Peter Menenexis?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds
[284] that my answer may tend to incriminate me.

Mr. Zagel: Q. Do you know Mike Castaldo, who formerly owned the "One Step Beyond" tavern located at Grand Avenue and Oak Park Avenue in Chicago?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Mr. Zagel: Q. Do you know Joe Donzanelli?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Mr. Zagel: Q. Was Donzanelli the liquor licensee of the "One Step Beyond" tavern?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds
[285] that my answer may tend to incriminate me.

Mr. Zagel: Q. Did you collect a total of $2,000 on

an original loan of $1,700 from Dave Wasserman of Birchwood Avenue in Chicago?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

39 Mr. Zagel: Q. Did you file an income tax return with the Federal Government for the years 1964, 1965 and 1966?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

40 Mr. Zagel: Q. What lines of gainful employment have you followed since you left the Chicago Police Department?

A. I refuse to answer on the grounds that my answer may tend to incriminate me.

[286] Co-Chairman Laughlin: The Chair orders and directs you to answer the question, sir.

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

41 Mr. Zagel: Mr. Sarno, I am holding in my hand a signed order signed by Judge Edward J. Egan on January 30, 1969, and in pertinent part it reads:

> "The Court orders each of the said respondent-defendants, to-wit, Chris Cardi, Patsy Ricciardi and Albert Sarno, are hereby ordered to be and

appear before the said Commission on such date or dates and at such place or places as the said Commission may direct, provided that at least five days' written notice be served on their respective attorneys and to then and there answer the questions previously propounded to him and attached to the petition.

"The Court further orders that each of the said defendant-respondents be and he is hereby released from all liability to be prosecuted or punished on acts of any manner to which he shall testify before the said Commission except for perjury or contempt of court by the said respondent-defendant before the said Commission."

2 [287] Q. Now, the questions that you have just been asked are all questions which you were previously asked to which the court order that I have just read refers, and I think that you, Mr. Witness, should know that the counsel for the Commission will recommend that the Commission proceed against you in the Circuit Court of Cook County and ask that the Court hold you in contempt of court and remit you to the jail for your refusal to answer these questions.

In light of that fact, do you wish to answer any of the questions that I have previously asked you today?

The Witness: A. I refuse to answer on the grounds that my answer may tend to incriminate me.

292-296] On April 7, 1969, the Commission filed a motion, as to each defendant, to show cause why he should not be held in contempt of court for failing to answer the questions referred to in the order of January 30, 1969, and propounded to him before the Commission on February 28, 1969.

304-308] On April 7, 1969, the Court entered a rule to show cause on Albert Sarno and Chris Cardi to show

cause why they should not be held in contempt of court for failing to comply with the previous order of court.

[308-314] On May 6, 1969, defendants filed a verified answer to the motion to show cause alleging the same affirmative defenses previously stated in defendants' motion to dismiss or in the alternative to strike previously referred to as being filed by defendants in answer to the Commission's motion to appear before the Commission and answer such questions as may be put to each of them, including but not limited to questions attached as exhibits (A. 19-22).

[320-328] On May 9, 1969, the Court entered an order finding Defendants, Albert Sarno and Chris Cardi in contempt of court and sentenced each of the defendants to six (6) months in the County Jail. The order recited that (1) Chris Cardi and Albert Sarno were guilty of wilful contempt of court; (2) that Chris Cardi and Albert Sarno shall be committed to the County Jail for a period of six (6) months; and (3) that the Clerk of the Circuit Court of Cook County issue a mittimus directing that Albert Sarno and Chris Cardi be taken into custody by the Sheriff and be committed to the County Jail.

ILLINOIS SUPREME COURT OPINION.

On May 27, 1970, the Illinois Supreme Court filed the following opinion, reported at 45 Ill. 2d 473 (1970):

ILLINOIS CRIME INVESTIGATING COMMISSION, *Appellee*, vs. ALBERT SARNO, ET AL., *Appellants*. — No. 42422 — Appeal from Circuit Court, Cook County

MR. JUSTICE CREBS delivered the opinion of the court:

On February 8, 1968, the circuit court of Cook County ordered the defendants to appear before the Illinois Crime Commission and answer questions put to them by the Commission which was then investigating "juice" rackets. The defendants appeared before the Commission but invoked the fifth amendment to all questions asked. On March 21, 1968 the Commission moved the circuit court to enter an order pursuant to section 14 of the Illinois Crime Investigating Commission Act (Ill. Rev. Stat. 1967, ch. 38, par. 203-14) releasing the defendants from all liability to be prosecuted for any testimony they might give before the Commission and compelling the defendants to appear before the Commission and answer such questions as may be put to them. On January 30, 1969, the circuit court granted the motion.

Pursuant to the court's order, defendants appeared before the Commission but again invoked the fifth amendment. On May 9, 1969 the court entered judgment finding defendants in contempt of court and sentenced them to a term of six months in jail.

Defendants appeal from the judgment finding them guilty of contempt of court on several grounds. The first is that the circuit court was without jurisdiction to grant an express order of immunity under section 203-14 of the Illinois Crime Investigating Commission Act. Hence, the defendants argue, the entire order of the circuit court was void. While we agree that nowhere in section 203-14 is the circuit court given the express power to grant immunity to the defendants, we cannot agree that the order of the circuit court was void. The statute clearly gives the circuit court the power to compel the defendants to appear before the Commission and answer questions. The fact that the court also granted the defendants immunity would not deprive it of jurisdiction to order the defendants to appear before the Commission and answer its questions. By statute, immunity would attach as soon as the defendants would comply with the order and answer questions.

Defendants next argue that the immunity protection of section 203-14 is not as broad in scope as the fifth amendment of the United States constitution. Therefore, the defendants claim that they were justified in invoking the fifth amendment a second time before the Commission. Defendants rely on *Hoffman* v. *United States,* 341 U. S. 479, 95 L. Ed. 1118, 71 S. Ct. 814, in support of their contention. That case held a witness is protected by the fifth amendment from compelled testimony unless "* * * it is perfectly clear, from a careful consideration of all the circumstances in the case that the witness is mistaken, and that the answer cannot possibly have such tendency to incriminate". Defendants contrast this language with section 203-14 which reads:

"The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

The defendants assert the "reasonably certain" standard in section 203-14 is narrower in scope than the "perfectly clear" standard in *Hoffman* v. *United States.* Fifth amendment rights being guaranteed by the Federal constitution, the construction placed upon these rights by the United States Supreme Court is the highest authority and is binding upon these defendants. By its decision in *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594, that court has made it perfectly clear that the full scope of fifth amendment protection is granted to any witness who is compelled to testify. In that case the court, being faced with the issue whether "'* * * one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction", held that "'* * * the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law * * *'". L. Ed. 2d at pp. 680, 694.

We find no merit in defendants' third contention that the State did not affirmatively demonstrate to the defendants that immunity from prosecution was available to them. The Commission, in its motion to have

the defendants answer questions put to them by the Commission, specifically mentioned section 203-14. That section grants immunity to the defendants from further prosecutions. That this immunity is co-extensive with the fifth amendment has been established by the holding of *Murphy* v. *Waterfront Commission*. The defendants demonstrated that they were well aware of the immunity available to them in their motion to dismiss the Commission's motion where they cited both section 203-14 and the *Murphy* decision.

The defendants' final argument is that because the information upon which some questions before the Commission was based was obtained from records which a court had previously suppressed, the questions put to them were improper. That argument overlooks the fact that the Crime Commission hearings do not constitute criminal proceedings of any kind. Rather the Commission is an arm of the legislature directed to investigate organized crime. For these reasons the motion to remand for hearing, which was taken with the case, is denied.

Judgment affirmed.

CERTIORARI GRANTED.

No. 565 SARNO v. ILLINOIS CRIME INVESTIGATING COMMISSION.

The petition for writ of certiorari is granted limited to questions 1 and 3 as set forth in the petition which read as follows:

"1. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

3. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?"

Supreme Court of the United States

No. 565-------, *October Term, 19* 70

Albert Sarno and Chris Cardi,

Petitioners,

v.

Illinois Crime Investigating Commission

ORDER ALLOWING CERTIORARI. Filed March 1, 1971

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted limited to questions 1 and 3 as set forth in the petition which read as follows:

"1. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

"3. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as further State prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future State prosecutions?"

FILE COPY

No. 70-7

Supreme Court, U.S.
FILED
AUG 20 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~585~~

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent,

vs.

ALBERT SARNO AND CHRIS CARDI,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE ILLINOIS SUPREME COURT.

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THE ROTHSCHILD-MADISON PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent,

vs.

ALBERT SARNO AND CHRIS CARDI,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE ILLINOIS SUPREME COURT.

Petitioners, Albert Sarno and Chris Cardi, respectfully pray that a writ of certiorari issue to reverse the judgment of the Illinois Supreme Court finding petitioners guilty of contempt.

OPINION BELOW.

The only opinion is that issued by the Illinois Supreme Court in Case No. 42422, which is included in the Appendix.

JURISDICTION.

1. Judgment was entered on May 27, 1970.

2. Rehearing was not requested. There was no order entered granting an extension of time within which to petition for certiorari.

3. The statutory provision conferring on this Court's jurisdiction to review the judgment is Title 28, Section 2101 (c) United States Code Annotated.

QUESTIONS PRESENTED.

1. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

2. Can a state legislative commission use records illegally seized from the home of a person by the police and previously ordered suppressed in a prior criminal case for the purpose of framing questions to that same person, pursuant to an immunity statute, without violating that person's rights under the Fourth, Fifth and Fourteenth Amendments with reference to future state prosecutions?

3. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the Fourth Amendment, Fifth Amendment and the Fourteenth Amendment. The State of Illinois Immunity Statute, Chapter 38, Section 203-14, provides that:

> "In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman

or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. *After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence.* He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

STATEMENTS OF CASE.

Police officers entered the home of Chris Cardi, without a warrant, and seized certain records. From information obtained from these records, defendants, Chris Cardi and Albert Sarno, were indicted and tried in the Criminal Court of Cook County, Illinois.

That upon the trial of that indictment the court entered an order suppressing these records.

That either before or after these records were ordered suppressed, the Chicago Police Department and/or the State's Attorney of Cook County photostated these records and forwarded them to the Federal Government and the Illinois Crime Investigating Commission.

That the same records that had been previously suppressed were then used by the Illinois Crime Investigating Commission and formed the basis for the questions propounded to the defendants, Chris Cardi and Albert Sarno, at the hearings before the Commission.

Subsequently, the defendants were subpoenaed to appear before the Illinois Crime Investigating Commission that was investigating the "juice racket." On February 24, 1968, the defendants appeared before the Commission and invoked the Fifth Amendment to all of the questions asked (A. 2-11) and (A. 11-18). The records previously illegally seized from the home of Chris Cardi and ordered suppressed, formed the basis for the questions asked of each defendant.

The questions the defendants were directed to answer fall into certain categories, and it is readily apparent from the questions that the defendants were being questioned not because they had been a victim of the "juice racket," or because they had some independent information concerning the racket, but because they presumably had been and were then actively engaged in the racket and the State was interested in all their sources of income, their numerous business associations and details of the racket. The categories are as follows:

1. The present occupation of Chris Cardi and his occupation from 1963 to the present (A. 8) and of Albert Sarno (A. 11).

2. Was Cardi's occupation from 1963 to the present that of a juice collector or enforcer (A. 3), and what lines of gainful employment did Sarno have since he left the police department (A. 17), and was it not true that Cardi from 1963 to the present had made juice collections from over a hundred people.

3. Did Cardi file income tax returns for the years

1964, 1965 and 1966, and with which office (A. 5); did Sarno file income tax returns for the years of 1964, 1965 and 1966 (A. 17), and with what office (A. 18).

4. Cardi's association with Joseph Gagliano as a juice collector or other business (A. 3); whether Gagliano picks him up every morning (A. 5) and pays for his services as a collector; did Sarno make loans for Gagliano and also some without Gagliano (A. 13); and does Sarno take orders from Gagliano.

5. Similar questions of both defendants with reference to a certain man named Messino (A. 3, 4, 7, 13, 14, 15).

6. Cardi's association with Jackie "The Lackey" Cerone (A. 3), a business organization known as Yogi Bear Drive Inns, Leo Netzel (A. 4), Moons Sandwich Shop, Mr. Lucky's Tavern (A. 5), Chicago Linoleum and Tile Co., Stefano's Restaurant (A. 6), Bar Nazionale (A. 8), Albert Sarno, Fiore Buccieri, Vic Damone Pizza Company, Independent Factoring Company (A. 9) and Ray Finnerman (A. 10).

Sarno's association with Moons Sandwich Shop (A. 12), Red Steer Restaurant, Flying Carpet Motel, Sam and Sleepy's Tavern, Jack "The Lackey" Cerone (A. 15), Mike Cataldo (A. 16) and Joe Donzanelli (A. 17).

7. Cardi's negotiation or collection of juice loans from Mr. Boyd (A. 4), Joseph Gillespie, a person known as "Doc" (A. 6), Bruce Carman, Charles Tappert (A. 7), Mr. White (A. 8, 9) and Ray Finnerman (A. 10).

Sarno's negotiation or collection of juice loans from Mr. Black (A. 13), Mr. James (A. 14), Ed Bach (A. 15), Larry Greenbaum, Philip Marzarello, George and Pete Menenexis (A. 16) and Dave Wasserman (A. 17).

8. Some of the questions were confined to the City of Chicago or the suburbs—many others were asked without any reference as to whether the acts occurred in the State of Illinois or the time at which they occurred, including the following:

With reference to Cardi—Collections of $200 a week from Joseph Gillespie on a loan of $2,900; collections of $2,000 a week from a person known as "Doc" on a loan of $20,000 (A. 6); collections of $600 a month from Bruce Carman on a $7,300 loan; the lending of $7,000 to Charles Tabbert (A. 7); gainful occupation of Cardi from January 1, 1963 to date; the presence of Cardi when White made payments on a loan at the interest of 10% a week to Messino (A. 8); Cardi's association in a business venture with Sarno; Cardi's association in a business venture with Buccieri (A. 9); collection of a loan from a Ray Finnerman, and whether Finnerman left his home and went to Texas (A. 10).

With reference to Sarno—The arrest of Sarno by the F. B. I. on April 2, 1962, for theft from interstate shipments; whether Sarno made loans to various persons on behalf of Messino and Gagliano (A. 12); is Sarno still a juice collector for Messino and Gagliano; did Sarno threaten Mr. Black's mother when Mr. Black became delinquent in his loan (A. 13); did Sarno exhibit a pistol and wave it under the face of Mr. Black; did Sarno make a loan to a Mr. James, who previously testified that he had borrowed money at 8% per week; was Sarno present when Messino threatened Mr. James with a baseball bat (A. 14); the collection of $750 a month from Larry Greenbaum on a loan of $5,000; did Greenbaum skip town to avoid

the juice payments; the collection of $100 a week from Philip Marzarello on a $1,500 loan, and whether he escaped from the City to avoid making further juice payments; collection of $100 a week on principal and $100 on interest for 100 weeks from George and Peter Menenexis (A. 16); and the gainful employment of Sarno since he left the Chicago Police Department (A. 17).

On March 21, 1968, the Illinois Crime Investigating Commission filed a motion in the Circuit Court of Cook County (Miscellaneous Section) requesting (1) that defendants be released from all liability to be prosecuted or punished on account of any matter to which they shall testify before the Commission, and (2) moving the court for an order on the defendants to appear before the Commission and answer the questions that may be put to each of them. The court entered an order granting the request of the Commission. The defendants then reappeared and refused to answer the questions once again, invoking the Fifth Amendment. The Commission then filed a petition for a rule to show cause before the court and defendant's filed an answer to the petition alleging (1) that Chapter 38, Section 203-14 violates the self-incrimination clauses of the Illinois State and Federal Constitutions in that it makes no provisions for the "fruits of the poisonous tree" (A. 64), and (2) that answers to the questions propounded to the defendants would subject them to prosecution in this State.

On May 9, 1969, the Court entered an order finding defendants in contempt of court and sentenced them to a term of six (6) months in the county jail for failing to comply with the provisions of the order in violation of Chapter 38, Section 203-13 and 203-14, Illinois Revised Statutes, 1967.

The Respondents, Albert Sarno and Chris Cardi, raised

the issues when testifying before the Illinois Crime Investigating Commission when they invoked the Fifth Amendment to the questions being asked (A. 2-19). The attorney for the respondents raised the issue in the trial court by pleading that the Illinois Immunity Statute did not protect the respondents from the "fruits of the poisonous tree" (A. 28). The issues were raised in the Illinois Supreme Court under the following headings:

> "CHAPTER 38 SECTION 203-14 IS NOT AS BROAD IN SCOPE AS THE FIFTH AMENDMENT—IT CONTAINS AN EXCEPTION; DEFENDANTS' RIGHTS WERE PROTECTED, THEREFORE, BY THE FIFTH AMENDMENT, AND DEFENDANTS WERE ENTITLED TO A HEARING UNDER THE "PERFECTLY CLEAR" STANDARDS.
>
> THE STATE DID NOT AFFIRMATIVELY DEMONSTRATE TO THE DEFENDANTS THAT A VALID IMMUNITY FROM PROSECUTION FROM FEDERAL, STATE AND SISTER STATES WAS AVAILABLE AND APPLICABLE TO THEM.
>
> THE QUESTIONS ASKED OF THE DEFENDANTS BEFORE THE COMMISSION WERE TAINTED; THE INFORMATION UPON WHICH THE QUESTIONS WERE BASED WAS OBTAINED FROM PHOTOSTATS OF RECORDS THAT A COURT OF LAW HAD PREVIOUSLY SUPPRESSED."

ARGUMENT.

Fifth Amendment.

The respondents fear future prosecution under State law only. The Illinois Immunity Statute affords protection to the respondents only in that they "shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence." The immunity statute is not as broad as the Fifth Amendment. It makes no provision for the "fruits of the poisonous tree;" it is similar to the Federal Immunity Statute found violative of the respondents' rights under the Fifth Amendment in *Counselman* v. *Hitchcock*, 142 U. S. 547, 564, 586, where the court construing a Federal Immunity Statute, stated at page 564, that the statute:

> 1. "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. . ."
>
> 2. "could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. . ."

at page 586:

> 3. "affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

As to each question asked of the respondents, it was "evident from the implications of the question, in the setting in which it (was) asked, that a responsive answer

to the question or an explanation of why it (could not) be answered might be dangerous because injurious disclosure could result," *Malloy* v. *Hogan*, 378 U. S., 1, 14; *Hoffman* v. *United States*, 341 U. S., 486-487.

The Illinois Supreme Court's reliance on the case of *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, is misplaced. The *Murphy* case only holds that the Federal Government must be prohibited from making use of state-compelled testimony and its fruits. The *Murphy* case does not hold that a state is prohibited from using the fruits of state-compelled testimony under the state immunity statute in future state prosecutions. The *Murphy* case does not overrule the *Malloy* case, it is only a related subject.

Fourth Amendment

Certain records were illegally seized from the home of Chris Cardi by a police officer. Chris Cardi, as a result of the seizure of these records, was tried and indicted in the Criminal Court of Cook County. The records were ordered suppressed by the court in that case. The same records were photostated and turned over to the Illinois Crime Investigating Commission and formed the basis for the questions propounded to the respondents. The respondents at this time did not know that these records were being so used.

Respondents' petition to the Illinois Supreme Court set forth these facts, and the Illinois Supreme Court took the petition with respondents' briefs. Respondents' position was summarily dismissed by the Illinois Supreme Court on the following grounds:

> "That argument overlooks the fact that the Crime Commission hearings do not constitute criminal proceedings of any kind. Rather the Commission is an

arm of the legislature directed to investigate organized crime."

Records suppressed because of illegal seizure cannot be used for any purpose, *Silverthorn Lumber Co.* v. *United States*, 251 U. S., 385. The same decision was derived in the following cases:

Rogers v. *United States*, 97 F. 2d 691, First Circuit (1938), action to recover customs duties on liquors imported in to the United States;

Carlisle v. *State*, 276 Ala 436 (1965), bill in equity to abate a gambling license—police officers obtained evidence in illegal search;

Berkowitz v. *United States*, 340 F. 2d 168 C A 1 Mass 1965, libel for forfeiture of money intended for use in violation of revenue loss.

The State Did Not Affirmatively Demonstrate to the Respondents That a Valid Immunity From Future Prosecution Under State Law Was Available to Them.

The trial court entered an express order granting the respondents imunity. The Illinois Supreme Court held that the immunity statute did not authorize the circuit court to enter an express order granting immunity to the respondents. Illinois Supreme Court Opinion, page 15. At no time during the proceedings was it ever affirmatively demonstrated to the respondents that an immunity, as broad in scope as the Fifth Amendment, was available and applicable to them.

The Illinois Supreme Court, page 17, held that "The defendants demonstrated that they were well aware of the immunity available to them in their motion to dismiss the Commission's motion where they cited both Section 203-14 and the *Murphy* decision." However, the *Murphy*

decision protects the respondents only from future prosecution under federal law—the *Murphy* decision does not protect the respondents from further prosecution for the "fruits of the poisonous tree" under state law. Hence, the State did not meet its burden of affirmatively demonstrating to the respondents that an immunity as broad in scope as the Fifth Amendment was available and applicable to them.

> "A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating," *Stevens* v. *Marks*, 383 U. S. 234, 246.
>
> "It is common ground that petitioner cannot be jailed for refusing to incriminate himself unless either he waived his federal privilege against self-incrimination, or immunity adequate to offset that privilege was conferred upon him." *Stevens* v. *Marks*, 383 U. S. 234, 247.
>
> "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Stevens* v. *Marks*, 383 U. S. 234, 246.
>
> "A declaration that there was a valid immunity uttered for the first time on appeal would come too late." *Stevens* v. *Marks*, 383 U. S. 234, 246.

CONCLUSION.

The Illinois Supreme Court was in error in holding that respondents' fear of further state prosecutions was controlled by *Murphy* v. *Waterfront Commission*, 378 U. S. 52—it should have found that the case was controlled by *Malloy* v. *Hogan*, 378 U. S. 1, and *Stevens* v. *Marks*, 383 U. S. 234. Further, in view of the growing number and various kinds of state immunity statutes, the United States Supreme Court should rule on the question of whether or

not legislative commissions can use records illegally seized by the police, and previously ordered suppressed in a criminal case, for the purpose of propounding questions to a witness from whose house the records were illegally seized.

Respectfully submitted,

FRANK G. WHALEN,
111 West Washington Street,
Chicago, Illinois 60602,
Attorney for Petitioners Albert Sarno and Chris Cardi.

APPENDIX.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Docket No. 42422—Agenda 65—November, 1969.

ILLINOIS CRIME INVESTIGATING COMMISSION, Appellee, *vs.* ALBERT SARNO *et al.*, Appellants.

Mr. JUSTICE CREES delivered the opinion of the court:

On February 8, 1968, the circuit court of Cook County ordered the defendants to appear before the Illinois Crime Commission and answer questions put to them by the Commission which was then investigating "juice" rackets. The defendants appeared before the Commission but invoked the fifth amendment to all questions asked. On March 21, 1968 the Commission moved the circuit court to enter an order pursuant to section 14 of the Illinois Crime Investigating Commission Act (Ill. Rev. Stat. 1967, ch. 38, par. 203—14) releasing the defendants from all liability to be prosecuted for any testimony they might give before the Commission and compelling the defendants to appear before the Commission and answer such questions as may be put to them. On January 30, 1969, the circuit court granted the motion.

Pursuant to the court's order, defendants appeared before the Commission but again invoked the fifth amendment. On May 9, 1969 the court entered judgment finding defendants in contempt of court and sentenced them to a term of six months in jail.

Defendants appeal from the judgment finding them guilty of contempt of court on several grounds. The first is that the circuit court was without jurisdiction to grant an

express order of immunity under section 203—14 of the Illinois Crime Investigating Commission Act. Hence, the defendants argue, the entire order of the circuit court was void. While we agree that nowhere in section 203—14 is the circuit court given the express power to grant immunity to the defendants, we cannot agree that the order of the circuit court was void. The statute clearly gives the circuit court the power to compel the defendants to appear before the Commission and answer questions. The fact that the court also granted the defendants immunity would not deprive it of jurisdiction to order the defendants to appear before the Commission and answer its questions. By statute, immunity would attach as soon as the defendants would comply with the order and answer questions.

Defendants next argue that the immunity protection of section 203—14 is not as broad in scope as the fifth amendment of the United States constitution. Therefore, the defendants claim that they were justified in invoking the fifth amendment a second time before the Commission. Defendants rely on *Hoffman* v. *United States*, 341 U. S. 479, 95 L. Ed. 1118, 71 S. Ct. 814, in support of their contention. That case held a witness is protected by the fifth amendment from compelled testimony unless "• • • it is perfectly clear, from a careful consideration of all the circumstances in the case that the witness is mistaken, and that the answer cannot possibly have such tendency to incriminate". Defendants contrast this language with section 203—14 which reads:

> "The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

The defendants assert the "reasonably certain" standard in section 203—14 is narrower in scope than the "perfectly clear" standard in *Hoffman* v. *United States.* Fifth amendment rights being guaranteed by the Federal constitution, the construction placed upon these rights by the United States Supreme Court is the highest authority and is binding upon these defendants. By its decision in *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594, that court has made it perfectly clear that the full scope of fifth amendment protection is granted to any witness who is compelled to testify. In that case the court, being faced with the issue whether "* * * one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction", held that "* * * the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law * * *". L. Ed. 2d at pp. 680, 694.

We find no merit in defendants' third contention that the State did not affirmatively demonstrate to the defendants that immunity from prosecution was available to them. The Commission, in its motion to have the defendants answer questions put to them by the Commission, specifically mentioned section 203—14. That section grants immunity to the defendants from further prosecutions. That this immunity is co-extensive with the fifth amendment has been established by the holding of *Murphy* v. *Waterfront Commission.* The defendants demonstrated that they were well aware of the immunity available to them in their motion to dismiss the Commission's motion where they cited both section 203—14 and the *Murphy* decision.

The defendants' final argument is that because the information upon which some questions before the Commission

was based was obtained from records which a court had previously suppressed, the questions put to them were improper. That argument overlooks the fact that the Crime Commission hearings do not constitute criminal proceedings of any kind. Rather the Commission is an arm of the legislature directed to investigate organized crime. For these reasons the motion to remand for hearing, which was taken with the case, is denied.

JUDGMENT AFFIRMED.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.
County Department—Law Division.

ILLINOIS CRIME INVESTIGATING COMMISSION,
Petitioner,
vs.
ALBERT SARNO,
Respondent.

No. 66 L 1111.

Hon. EDWARD J. EGAN, Judge Presiding.

CONTEMPT ORDER.

This matter coming to be heard on the Motion For A Rule To Show Cause filed on behalf of the Petitioner by William J. Scott, Attorney General of the State of Illinois, the Court after issuing the requested Rule To Show Cause and after considering the record in this case and the arguments of counsel for both Petitioner and Respondent, and being now fully advised in the premises:

THE COURT DOTH FIND:

(1) That pursuant to the provisions of the Illinois Crime Investigating Commission Act, Illinois Revised Statutes 1967, Chapter 38, Section 203-14, the Illinois Crime Investigating Commission petitioned this honorable court for an order releasing the said Respondent, Albert Sarno, from all liability to be prosecuted or punished on account of any matter to which he shall testify in the matter

identified above before the said Commission, an further requiring the said Respondent, Alber Sarno, to be and appear before said Commissio and then and there answer such questions as migh be propounded to him.

(2) That on January 30, 1969, this Court entered a order directed to the said Respondent in accord ance with the prayer of the petition herein whic Order has been filed of record in this case, and b this reference thereto hereby made a part of thi Contempt Order as though fully setforth herein

(3) That this Order further provided that the sai Respondent should appear before the said Com mission on such date or dates and at such plac or places as the Commission may direct, provide that at least five days written notice be serve upon Respondent's attorney. That in accordanc within the terms of said order the Petitioner di on February 6, 1969, serve notice upon Respond ent, Albert Sarno, by letter properly addressed t the Respondent and his attorney, directing th Respondent to be and appear before the Illinoi Crime Investigating Commission on February 2 1969, at 118 North Clark Street, Room 535, Count Building, Chicago, Illinois.

(4) That on February 28, 1969, Respondent, Alber Sarno, appeared with Attorney Frank Whalen a the place and time specified.

(5) That at the public hearing convened that dat Respondent, Albert Sarno, having stated his nam and address, was asked each of the questions re ferred to in the order of January 30, 1969. Despit a direction by the Co-Chairman of the Commis sion ordering him to answer each such questio

Respondent, Albert Sarno, refused to answer each and every question propounded.

(6) That the above named Respondent, Albert Sarno, has wholly failed and neglected to comply with the provision of the Order heretofore entered.

(7) That the failure of the above named Respondent, Albert Sarno, to comply with the provisions of the Order heretofore entered constitutes contempt of this Court as defined in the Illinois Revised Statutes, 1967, Chapter 38, Sections 203-13 and 203-14.

(8) That all pleadings and exhibits filed in this case are hereby incorporated into this Contempt Order as though fully setforth herein.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That Albert Sarno is guilty of wilful contempt of this Court.
2. It is further ordered that Albert Sarno shall be committed to the County Jail for a period of six (6) months.
3. It is further ordered that the Clerk of the Circuit Court of Cook County shall issue a mittimus directing that the Respondent, Albert Sarno, be taken into custody by the Sheriff and committed to the County Jail.

ENTER: /s/ EDWARD J. EGAN
Judge

The same Contempt Order was entered as to Respondent, Chris Cardi.

Supr

ALBERT

ILLINOIS

(On

JAMES A. CAMP

Attorney General

Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 565

ALBERT SARNO and CHRIS CARDI,

Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

(On Petition For Writ of Certiorari To the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 45 Ill. 2d 473 (1970).

JURISDICTION

Petitioner designates Title 28 U.S.C. Section 2101 (c) as conferring jurisdiction on the Court to review the judgment in the instant case. This section provides a ninety-day time period within which a petition for writ of

certiorari may be filed to bring any judgment or decree in a civil action before the Court for review. Petitioner more properly may predicate jurisdiction on Title 28 U.S.C. Section 1257 (3) providing for review by writ of certiorari of the final decision of the highest court of a state where the validity of a state statute is drawn into question as being repugnant to the Constitution of the United States or where any privilege or immunity is claimed under the Constitution of the United States and Rule 22 (1) of the Rules of the Supreme Court of the United States—a designation in which Respondent herein concurs as to petitioners' first and third arguments.

This Court is without jurisdiction to review petitioners' second argument, however. The allegation that questions propounded to Sarno and Cardi by the Illinois Crime Commission were based upon evidence which a court had previously suppressed was never raised at the trial level either on the motion for entry of the immunity order or on the motion for the entry of the contempt order. *Quicksall* v. *Michigan,* 339 U.S. 660 (1950). Nor was the Fourth Amendment designated in the jurisdictional statement of petitioners' brief in the Supreme Court of Illinois, *Michigan Sugar Co.* v. *Michigan,* 185 U.S. 112 (1902); *Dewey* v. *Des Moines Iowa,* 173 U.S. 193 (1899), although reference was made to the Fourth Amendment in the body of the brief during petitioners' discussion of the evidence upon which the propounded questions were based. *Chicago R. Co.* v. *McGuire,* 196 U.S. 128 (1905). The Supreme Court in its opinion, while referring to this allegation in petitioners' brief, never directly ruled on the constitutional question which petitioners now seek to present. *Forbes* v. *Virginia State Council,* 216 U.S. 396 (1910). In their brief in this Court, Sarno and Cardi cite no reference to

the record in this case to support their bare allegation that the Commission questions were based upon inadmissible evidence. Indeed, petitioners even fail to cite the initial proceedings in which the evidence was alleged to have been suppressed. Consequently, this Court is without jurisdiction to consider the point. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Edelman* v. *California*, 344 U.S. 357 (1953); *Spies* v. *Illinois*, 123 U.S. 131 (1887).

QUESTIONS PRESENTED

1. Whether the immunity granted to petitioner was coextensive with the Fifth Amendment privilege against compulsory self-incrimination.

2. Whether the use by a legislative commission of evidence previously ruled inadmissible in judicial proceedings as the basis for questions propounded to petitioners during a hearing to which complete immunity from prosecution had attached violates the constitutional prohibition of unreasonable searches and seizures.

3. Whether the State affirmatively demonstrated to petitioners that the proffered grant of immunity from prosecution was as broad in scope as the Fifth Amendment privilege against self-incrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions are the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The statutory provision involved is Ill. Rev. Stat. (1965), Ch. 38, § 203-14, which provides:

"In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

STATEMENT OF THE CASE

The Circuit Court of Cook County on February 8, 1968, ordered petitioners Sarno and Cardi to appear and answer questions before the Illinois Crime Investigating Commission, which was then investigating the "juice" rackets. (A. 1). On February 24, 1968, petitioners appeared before the Commission and invoked the Fifth Amendment

privilege against self-incrimination in response to each of the questions put to them. (A. 2-18).

Upon motion by the Commission, the Circuit Court entered an order pursuant to Ill. Rev. Stat. (1965), Ch. 38, § 203-14[1] directing the petitioners to appear before the Commission and answer questions. The order also provided that immunity would attach to the answers given by petitioners to the Commission questions, excepting the offenses of perjury and contempt of court from the grant of immunity. (A. 32).

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1. In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States.

Cardi and Sarno reappeared before the Commission on February 28, 1969, and again refused to answer all questions put to them, invoking the Fifth Amendment. (A. 32-61). Following the filing by the Commission of a petition for rule to show cause and the petitioners' answer, the Circuit Court on May 9, 1969, entered an order finding petitioners in contempt of court and sentencing them to a term of six months in the County Jail for failure to comply with the provisions of the original order requiring them to appear and answer questions before the Commission. (A. 68).

Upon appeal to the Supreme Court of Illinois, the contempt order was affirmed. Petitioners then filed the instant Petition for a Writ of Certiorari to the Supreme Court of Illinois.

REASONS FOR DENYING THE WRIT

I.

THE IMMUNITY GRANTED TO PETITIONERS WAS AS BROAD IN SCOPE AS THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Petitioners fear future prosecution by the State should they appear before the Illinois Crime Commission and answer the questions put to them. They reason that their answers might provide leads to evidence previously unknown to State authorities which might form the basis of a future prosecution. Characterizing such evidence as the "fruits of the poisonous tree", petitioners argue that the grant of immunity provided by the Illinois Crime Commission statute is not coextensive with the Fifth Amendment privilege to be free from compulsory self-incrimina-

tion, and therefore, their refusal to answer based upon their Fifth Amendment privilege was justified. Such an argument ignores the holdings of two decisions of this Court—*Malloy* v. *Hogan*, 378 U.S. 1 (1964) and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964)—and the very essence of the Fifth Amendment privilege.

In *Malloy* v. *Hogan, supra*, this Court held the Fifth Amendment privilege against self-incrimination to be applicable to the States through the Fourteenth Amendment. With this holding as a basis, the Court went on to consider a related issue in *Murphy* v. *Waterfront Commission of New York Harbor, supra.*—whether a state witness granted immunity under state law may be compelled to testify if that testimony then may be the basis of a criminal prosecution by another jurisdiction. Since a grant of immunity to be valid must be coextensive with the scope of the privilege against self-incrimination, *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), the Court in *Murphy* undertook to delimit the scope of the Fifth Amendment privilege. After discussing the history, policies and purposes of the privilege, the Court held "that the Constitutional privilege against self-incrimination protects a state witness against incrimination under federal *as well as state law* and a federal witness against incrimination under state as well as federal law." (Emphasis added)

Disregarding the explicit language of this holding, petitioners herein argue—not that they fear prosecution by another jurisdiction after being granted immunity by Illinois—but that the very jurisdiction which immunized them from prosecution will later, in effect, retract this grant and initiate criminal proceedings. Such a theory ignores the rationale and language of *Murphy* and the

requirements of *Malloy*.[2] In *Murphy*, the Court, both by its explicit holding and its discussion of *Adams* v. *Maryland*, 347 U.S. 179 (1954), authoritatively disposed of petitioners' argument here. Referring to *Adams*, the Court quoted: "' a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. 347 U.S. at 181.'"[3] While *Adams* dealt with a state prosecution following a federal grant of immunity, the Court in *Murphy* continued: "This statement suggests that any testimony elicited under threat of contempt by a government to whom the constitutional privilege against self-incrimination is applicable • • • may not constitutionally be admitted into evidence against him in any criminal trial conducted by a government to whom the privilege is also applicable."[4]

Since the privilege is applicable both to the states and the federal government and since a grant of immunity to be valid must be coextensive with the privilege, a state witness [such as petitioners Cardi or Sarno] granted immunity by the state is protected from self-incrimination under both state and federal law. Therefore, petitioners Sarno and Cardi improperly refused to answer questions put to them by the Illinois Crime Investigating Commis-

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2. The holding in Malloy made the standards used to delineate the federal privilege applicable to the states. 378 U.S. at 11. Adopting the holding of Counselman v. Hitchcock, supra, in Murphy, the Court found those standards to be that incriminating testimony may not be compelled unless the testimony and its fruits cannot be used in any manner in connection with a criminal prosecution.

3. 378 U.S. at 75.

4. Id. at 75-76.

sion and were properly held in contempt by the Circuit Court of Cook County.

II.

USE OF EVIDENCE PREVIOUSLY RULED INADMISSIBLE BY A COURT TO FORMULATE QUESTIONS PROPOUNDED TO PETITIONERS BY A LEGISLATIVE COMMISSION IN A PROCEEDING TO WHICH COMPLETE IMMUNITY FROM PROSECUTION HAS ATTACHED DOES NOT VIOLATE THE FOURTH AMENDMENT PROVISION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

Petitioners assert that the Commission violated the Fourth Amendment prohibition of unreasonable searches and seizures by utilizing evidence which a court had previously suppressed to formulate questions to be propounded to Sarno and Cardi during the investigation of the "juice rackets" in Illinois. They cite no authority or record references to support their bald allegations either that the questioned evidence had been suppressed previously by a court, or, if previously held inadmissible, that the evidence did in fact form the basis for questions propounded to petitioners by the Commission. See Jurisdictional Statement. Even assuming both of these allegations were established, however, the circumstances of this case do not reflect any violation of the Fourth Amendment.

The Illinois Crime Investigating Commission was created by the Illinois legislature to investigate organized crime and to evaluate the extent to which organized crime exists

within the borders of the State of Illinois.[5] The enabling legislation also provides for the collection and dissemination of such information to aid the state in protecting and preserving the public welfare and safety of its citizenry. The members of the Commission are appointed by the legislature and the Governor,[6] with the Commission se-

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5. Ill. Rev. Stat (1963), Ch. 38, § 203-1 provides:

"It is the intent of the General Assembly, recognizing the frequent subversion of governmental, political and economic institutions through the influence of organized crime, (a) to set up adequate facilities for investigating and establishing the facts and general background relating to organized crime and to individual crimes insofar as they have a bearing on organized crime, whether the act or intent constituting the same, or both, occurs within or without the State so long as such organized crime or individual crimes affect the public safety, public peace, public health, public morals, public welfare or public justice of the State; (b) to evaluate the extent to which organized crime exists within the borders of the State and the degree of efficiency of law enforcement agencies in dealing with it; and (c) to make such facts, general background and evaluation available to the legislative, executive, judicial and administrative bodies and officials of the State, to the end that they may better perform their respective functions in preserving the public safety, public peace, public health, public morals, public welfare and public justice of the State.

This Act, and the jurisdiction of the Commission created thereby, is not intended to be in derogation of the jurisdiction of any Grand Jury of any County of the State."

6. Ill. Rev. Stat. (1963), Ch. 38, § 203-3.

lecting its own chairman. Thus, as the Supreme Court of Illinois recognized in its opinion in this case: ". . . The Crime Commission hearings do not constitute criminal proceedings of any kind. Rather, the Commision is an arm of the legislature directed to investigate organized crime."[7]

In support of their argument, petitioners rely on *Silverthorn Lumber Company* v. *United States*, 251 U.S. 385 (1920). *Silverthorn* does not control the instant case. While petitioners cite the decision for the broad proposition that "records suppressed because of illegal seizure cannot be used for any purpose"[8], the Court was speaking to a situation in which the federal government had seized illegally certain business records. After gaining knowledge of their existence through the seizure and after returning the documents to the owner, the government then sought their production by the owners through the use of subpoenas. In reversing the imposition of punishment for failure to comply with the subpoenas, the Court stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong *cannot be used by it in the way proposed.*"[9] (Emphasis added)

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7. Pet's. Br. 18.

8. Pet.'s Br. 11.

9. 251 U.S. at 392.

Thus, in *Silverthorn* (and the three lower court decisions cited by petitioner as reaching the same conclusion)[10], a person, through the use of judicial proceedings, was required to suffer a penalty or forfeiture based upon evidence illegally seized. The decision prohibiting the use of such evidence for those purposes in no way governs the instant case.

The hearings conducted by the Commission are not judicial proceedings. The Commission is a creature of the legislature designed to collect and collate data on organized crime. It is not empowered to prosecute or impose penalties. In the particular situation of the instant case, petitioners were subjected to no penalties or risks of future prosecution through the use of the inadmissible evidence in formulating questions. The evidence had been suppressed by a court, and therefore could not be used in a criminal proceeding against petitioners. The answers to any questions put to petitioners during the hearings were protected by the Fifth Amendment privilege against self-incrimination and the coextensive grant of immunity which would prevent the use of either the petitioners' testimony or its fruits in any subsequent criminal proceeding.[11] Thus, petitioners were subject to no liability through the use of the questioned evidence in a proceeding conducted by a legislative commission. The petitioners have cited no authority, and indeed there is none, to prohibit the use of such evidence in this circumstance.

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10. Rogers v. United States, 97 F. 2d 691 (1st Cir. 1938); Carlisle v. State, 276 Ala. 436 (1965); Berkowitz v. United States, 340 F. 2d 168 (1st Cir. 1965).

11. See Section I of the instant Brief.

III.

THE STATE AFFIRMATIVELY DEMONSTRATED, AND INDEED PETITIONERS WERE WELL AWARE OF THE VALID IMMUNITY FROM STATE PROSECUTION AVAILABLE TO THEM.

For their final argument, petitioners allege that the State did not affirmatively demonstrate the availability of a valid immunity from future state prosecution. This argument is clearly rebutted by the record, which reflects both the affirmative demonstration by the State of an immunity coextensive with the Fifth Amendment privilege against self-incrimination and the recognition by petitioners of that immunity.

Contained in the motion by the Commission, filed March 21, 1968, requesting the entry of an order pursuant to Ill. Rev. Stat. (1963), Ch. 38, § 203-14 granting to petitioners immunity from prosecution was the following language:

> "The motion moves the court to enter an order . . . releasing the said Chris Cardi and the said Albert Sarno *from all liability to be prosecuted or punished* on account of any matter to which he shall testify in the matter identified above before the said Commission, except for perjury or contempt of court. . . ."[12]

In petitioners' motion to dismiss or in the alternative to strike, petitioners demonstrated their clear understanding of the State's effort to grant immunity and of the relevant case law governing such grants. Throughout their motion, petitioners repeatedly refer both to the statutory

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12. A. 18-19.

immunity provision and to this Court's decision in *Murphy*.[13]

These proceedings occurred four years after the decisions in *Malloy* and *Murphy*. The State of Illinois made clear that the grant of immunity protected Sarno and Cardi from all liability to be prosecuted or punished. Petitioners themselves demonstrated their awareness of the decision in *Murphy* and its decisiveness of the issue. In this situation, the State can be required to do no more. Indeed, Illinois met its burden by affirmatively demonstrating a valid immunity from prosecution to petitioners. Should Sarno and Cardi choose to ignore or misinterpret the grant of immunity, they must suffer the consequences—in this case, a citation for contempt of court.

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13. A. 19-24.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition For Writ of Certiorari in the instant case be denied.

Respectfully submitted,

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E. ROBERT SEAVE

No. 70-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. [redacted]

ALBERT SARNO AND CHRIS CARDI,
Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITIONERS' BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 565

ALBERT SARNO AND CHRIS CARDI,
Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITIONERS' BRIEF.

OPINION BELOW.

The opinion of the Illinois Supreme Court is reported at 45 Ill. 2d 473 (1970) and printed at A.* 53-56.

JURISDICTION.

The statutory provision covering jurisdiction to review the judgment is Title 28, Section 2101 (c) United States Code Annotated.

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*A. refers to Appendix under Rule 36.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fifth Amendment to the Constitution of the United States, (A)* 1.

Article II Section 10, Illinois State Constitution, (A) 1.

1967 Illinois Revised Statutes:

Chapter 38, Sections 203-1, 203-10 and 203-14, (the latter statute is referred to as the Immunity Act) (A) 1-3;

Chapter 38, Sections 106-1 and 106-2, (referred to as the Grand Jury Act) (A) 3;

Chapter 77, Sections 4, 5 and 68, (A) 4, 5.

1965 Illinois Revised Statute:

Chapter 38, Section 39-1, 39-2 (Criminal Usury), (A) 3.

MISCELLANEOUS STATUTES.

1967 Illinois Revised Statutes:

Chapter 5, Section 158, Marketing Fresh Fruits and Vegetables;

Chapter 48, Section 501, On Employment Compensation;

Chapter 67½, Section 173, State Housing Act;

Chapter 67½, Section 278, Neighborhood Redevelopment Corp. Act;

Chapter 100½, Section 4, Public Nuisance (Prostitution);

Chapter 111⅔, Section 65, Public Utilities, (A) 6-9.

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* (A) refers to Appendix to Brief under Rule 40.

QUESTIONS PRESENTED.

1. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?

2. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

3. Subsidiary question necessarily involved; under a claim Immunity Act, can the State, with reference to future state prosecution, supplant the privilege when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?

STATEMENT OF THE CASE.

In 1963, the Illinois Legislature created the Illinois Crime Investigating Commission whose sole purpose was to investigate organized crime in Illinois, Chapter 38, Sections 203-1 to 203-17. The pertinent part of Section 203-14, referred to as the Immunity Act, is as follows:

> "*. . . that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or* produced evidence."

The Immunity Act is a claim immunity statute.

On this occasion the Commission was investigating the "juice loan" or "loan shark" racket.

On February 8, 1968, the presiding judge in the Circuit Court of Cook County entered an order requiring petitioners to appear before the Illinois Crime investigating Commission, A. 3, R. 78-84. On February 24, 1968, petitioners appeared before the Commission and refused to answer questions pleading the Fifth Amendment.

On March 21, 1968, the Commission filed a motion in the Circuit court, attaching a copy of the questions the petitioners refused to answer, and moved the court to enter an order, pursuant to Sections 203-14, directing the petitioners to appear before the Commission and answer the questions, and also requested the court to enter an express order releasing petitioners from all liability to be prosecuted or punished on account of any matter to which they shall testify before the Commission, A. 18, R. 86-90.

Petitioners filed a motion to dismiss or in the alternative to strike the foregoing motion, A. 19-22, R. 144-149. On April 22, 1968, the Commission filed a reply to petitioners' motion to dismiss, A. 22, R. 156-176. On July 26, 1968, peti-

tioners' motion to dismiss or in the alternative to strike was denied, A. 23, R. 181.

On January 30, 1969, the court entered an order directing the petitioners to reappear before the Commission and answer the questions previously propounded to them and entered an express order releasing them from all liability to be prosecuted or punished on account of any matter to which they shall testify before the Commission, A. 23, 24, R. 218-245. Pursuant to this order, petitioners appeared for the second time before the Commission on the 28th day of February, 1969, and still refused to answer the questions pleading the Fifth Amendment. Each of the questions asked of Cardi is reprinted at A. 24-39, R. 245-265. Each of the questions asked of Sarno is reprinted at A. 39-51, R. 272-287. The questions asked of Cardi are grouped and summarized at Pet. Br. 12-14. The questions asked of Sarno are grouped and summarized at Pet. Br. 12-14.

On April 7, 1969, the court entered a rule to show cause on Cardi and Sarno as to why they should not be held in contempt of court for failing to comply with the previous order, A. 51-52, R. 304-308, and on May 6, 1969, petitioners filed a verified answer to the rule to show cause, A. 52, R. 308-314. On May 9, 1969, petitioners were found in contempt of court and sentenced to serve a period of six months in the County Jail, A. 52, R. 320-328.

The decision of the trial court was affirmed by the Illinois Supreme Court. The Illinois Supreme Court held that there was no authority for the trial court to enter an express order of immunity, but that the immunity referred to in Section 203-14 was coextensive with the Fifth Amendment, citing *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52.

SUMMARY OF ARGUMENT.

The provisions of the Immunity Act do not supplant the privilege.

At the time of the compelled testimony, the Immunity Act, using phraseology found in no other Illinois immunity statute, had not been interpreted by the Illinois courts as being sufficient to supplant the privilege, and petitioners could not look to the Illinois State Constitution.

Illinois uses two different standards; that is, (1) when a person testifies before the Grand Jury or in a court of record, pursuant to Chapter 38, Section 106-1 and Section 106-2 (referred to as the Grand Jury Act), he is testifying pursuant to provisions found adequate to supplant the privilege in *People* v. *Walker*, 28 Ill. 2d 585, 590; however, (2) when a person testifies before the Illinois Crime Investigating Commission, whose sole duty is to investigate organized crime, he is testifying under conditions where the statute, on its face, does not supplant the privilege.

The Illinois Legislature intended that two different standards be used; approximately two years after the provisions of the Grand Jury Act were found adequate in the *Walker* case, the legislature amended the Immunity Act but did not change the phraseology of the necessary provisions in the Immunity Act to comply with the decision in the *Walker* case. Further, this failure on the part of the legislature violated the federal standard of "fundamental fairness."

The failure of the Illinois Legislature to include any rules for discovery in criminal cases, violates a person's rights under the Sixth Amendment and violates the federal standard of "fundamental fairness"—in any subsequent prosecution, a person would be unable to ascertain whether or not the subsequent prosecution was based on the "fruits"

or "links" of the compelled testimony nor even reply to any contention of the state that the subsequent prosecution is based on "independent evidence."

The failure of the Immunity Act to include the phrase "or subjected to penalty or forfeiture," in a state where a person can go to jail for failure to pay judgments where "malice is the gist of the action" pursuant to 1967 Ill. Rev. Stat., Chapter 77, Sections 4, 5 and 68, is a failure to include provisions as broad in scope as the Fifth Amendment.

Inasmuch as the basic purpose behind the privilege lies in the integrity of the government, *Tehan* v. *Shott*, 382 U. S. 406, 415, and represents a moral striving of the community, *Malloy* v. *Hogan*, 378 U. S. 1, 9, a state must affirmatively demonstrate to a person, when testifying pursuant to the Illinois Immunity Act, that an immunity as broad in scope as the Fifth Amendment is available and applicable to them—the foregoing is not related to the special facts and circumstances found in *Stevens* v. *Marks*, 383 U. S. 234, 244—it applies where the statutes and procedures in a state violate the federal standard of "fundamental fairness."

ARGUMENT.

I.

ASSUMING THE IMMUNITY STATUTE WAS NOT AS BROAD AS THE FIFTH AMENDMENT, AS FAR AS FUTURE STATE PROSECUTIONS ARE CONCERNED, MAY A PERSON PLEAD THE FIFTH AMENDMENT WHEN IT IS EVIDENT, FROM THE IMPLICATION OF THE QUESTIONS IN THE SETTING IN WHICH THEY ARE ASKED, THAT RESPONSIVE ANSWERS TO THE QUESTIONS MIGHT BE DANGEROUS BECAUSE INJURIOUS DISCLOSURE COULD RESULT IN FUTURE STATE PROSECUTIONS?

Illinois Law.

In Illinois an immunity statute to be valid must afford absolute immunity against future prosecutions for the offense to which the question relates and thus follows the language in *Counselman* v. *Hitchcock,* 142 U. S. 547, 586, and cases cited therein. *People* v. *Newmark,* 312 Ill. 625, 632, 633 (1924)—

> ". . . but if the proposed evidence has a tendency to incriminate the witness or to establish a link in the chain of evidence which may lead to his conviction, or if the proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of a criminal offense, he cannot be compelled to answer. (*Minters* v. *People,* 139 Ill. 363; *Lamson* v. *Boyden,* 160 id. 613; *People* v. *Argo,* 237 id. 173; *Counselman* v. *Hitchcock, supra*) . . . We are clearly of the opinion that no statute which leave the witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the constitutional guaranty. We are supported in this conclusion by the following among other authorities: *Counselman* v. *Hitchcock, supra; People* v. *Argo, supra; Emery's case,* 107 Mass. 172; *Cullen* v. *Commonwealth,* 24 Gratt. 624."

Illinois Constitution.

"Section 10 of article II of the Illinois constitution provides that 'No person shall be compelled in any criminal case to give evidence against himself.' No substantive difference appearing between this provision and the like provision in the fifth amendment to the United States constitution, the provisions may be construed alike and United States Supreme Court decisions construing the fifth amendment are authoritative in construing the similar provision of our constitution (*People* v. *Grod,* 385 Ill. 584)." *Halpin* v. *Scotti,* 415 Ill. 104, 107 (1953). Yet "Where it is sought by statute to authorize the courts to grant immunity to material witnesses, a construction must not be placed upon the immunity statute which will abridge the constitutional privilege of silence." *People* v. *Newmark,* 312 Ill. 625, 632. "In consideration of such statutes the test is whether the immunity becomes a complete substitute for the constitutional privilege. Legislation cannot abridge this constitutional privilege, but the statute must be so broad as to have the same scope and effect." *People* v. *Boyle,* 312 Ill. 586, 597 (1924).

Standards and Interpretations.

Illinois uses two different standards. A witness, when appearing before the Grand Jury or at a trial in a court of record pursuant to Chapter 38, Section 106-1 and Section 106-2, Ill. Rev. Stat. 1967 (hereinafter called the Grand Jury Act), is granted immunity "from prosecution *for any offense* shown in *whole or in part* by such testimony." Section 106-2 of the Grand Jury Act enacted August 18, 1963, is as follows:

> "Effect of Immunity.) Such order of immunity shall forever be a bar to prosecution against the witness *for any offense* shown in *whole or in part* by such

> testimony or other evidence except for perjury committed in the giving of such testimony." (Emphasis supplied.)

The language in the Grand Jury Act is taken from its predecessor, Chapter 38, Section 714.1, Ill. Rev. Stat. 1961. The pertinent language of the latter statute was "and such order shall forever after be a bar to any indictment, information or prosecution against the witness for any felony or misdemeanor *shown in whole or in part by such testimony.*" (Emphasis supplied.) The latter statute was interpreted by the Illinois Supreme Court in *People* v. *Walker*, 28, Ill. 2d 585, 590 (1963)—"the statute eliminates the constitutional provision against self-incrimination by a grant of immunity that bars prosecution of the witness for any offense '*shown in whole or in part* by such testimony.' " (Emphasis supplied.) At the present time, therefore, under Illinois law, the Grand Jury Act is sufficient to supplant the privilege.

When, however, a witness is testifying pursuant to Chapter 38, Section 203-14, Ill. Rev. Stat. (1967) (hereinafter referred to as the Immunity Act) before the Illinois Crime Investigation Commission, whose sole purpose is to investigate organized crime, a different standard is used. The pertinent part of Section 203-14 of the Immunity Act provides as follows:

> "that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, *he gave answer.*" (Emphasis supplied.)

Further, on August 24, 1965, about two years after the *Walker* case and the enactment of the Grand Jury Act, Section 203-14 of the Immunity Act was also amended, but the pertinent language stated above was untouched. This is a clear indication that the legislature had no intention

to grant to a witness an immunity sufficient to supplant the privilege found adequate in *Walker*. Additionally, at the time petitioners testified, the Illinois Supreme Court had not interpreted the Immunity Act. When it did so, on this appeal, the Illinois Supreme Court (A. 55, 56) referred to the decision in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, as authority for the Immunity Act being sufficient to supplant the privilege. Petitioners' position is that the *Murphy* case refers only to the situation of a person testifying in a state setting who fears federal prosecution.

The privilege embraces those answers which would furnish a link in the chain of evidence needed to prosecute, *Hoffman* v. *United States*, 341 U. S. 479, 486; *Malloy* v. *Hogan*, 378 U. S. 1, 14.

Petitioners were examined with reference to over one hundred juice collections from 1963 to 1966 (A. 28, q. 11). And further questions could lead only to the conclusion that these offenses were being committed up to the time petitioners testified, February 28, 1969. By conservative estimate, the examination referred to over two hundred transactions (criminal usury was made an offense on August 10, 1965, 1965 Ill. Rev. Stat., Chapter 38, Section 39-1) (A) 3. They were questioned in a background referring to their arrest for kidnaping, assault and robbery of one Joseph Weisphal; their arrest for theft for interstate shipments; they were referred to as enforcers; that they had made certain threats and allegations to the mother of one of the juice customers; that Sarno was present when Messino threatened a juice customer with a baseball bat; that three of the customers left Chicago in order to avoid the petitioners; and in such a context as to show that they had used "terror tactics" in collecting the juice loans; but were examined with reference to only a small percentage of the specific transactions. The questions of Cardi com-

mence at Appendix 24 and those of Sarno at Appendix 39, and the questions have been numbered for reference.

Suppose petitioners had been asked only one question (A. 42 q. 12)—"At what places in Cook County have your juice customers met you to make their weekly payments?" and petitioners "gave answers" to the questions. Assume then that the state went to these centers, interviewed the customers, learned from them that petitioners had committed any one of the offenses of violence punishable under the Criminal Code, whether committed against them or another customer known to them. Petitioners were not asked to give answer to an act of violence. Nevertheless, the answer to the question would be the "link" necessary to prosecute for an offense of violence, and the Immunity Act does not cover "links" or "fruits."

The questions as to Cardi and Sarno fall in certain categories—

Group I—Specific Juice Transactions.

Cardi.

q. 15, Mr. Boyd; q. 30, a person known as "Doc;" q. 31, 32, Bruce Carman; q. 33, 34, Charles Tabbert; q. 42, Mr. White; q. 48, 49, 50, 51, 52, Ray Finnerman.

Sarno.

q. 13, Mr. White; q. 14, 15, 16, 17, Mr. Black; q. 18, 19, 20, 21, 22, Mr. James; q. 29, Ed Back; q. 30, 31, Larry Greenbaum; q. 32, 33, Philip Marzarello; q. 34, George and Peter Menenexis; q. 38, Dave Wasserman.

Group II—The Centers of Activities.

Cardi.

q. 21, 22, Moon's Sandwich Shop; q. 23, 24, 25, Mr. Lucky's Tavern; q. 26, 27, Chicago Linoleum and Tile Company; q. 28, Stefano's Restaurant.

Sarno.

q. 16, Mr. Lucky's Tavern; q. 24, Red Steer Restaurant; q. 25, Sam and Sleepy's Tavern.

Group III—Business Acquaintances and Hangouts.

Cardi.

q. 16, 17, Yogi Bear Drive-ins, Bruce Carman and Leo Netzel; q. 40, has been frequenting Bar Nazionale; q. 45, Fiori Bucciere; q. 46, Frank Bucciere.

Sarno.

q. 35, Mike Castaldo; q. 36, Joe Donzanelli.

Group IV—The Higher-Ups.

Cardi.

q. 6, Messino; q. 7, Gagliano; q. 8, Jackie Cerone; q. 9, Cerone and Messino; q. 10, Joe Gagliano; q. 13, how much money did Cardi keep and how much did he turn over to the higher-ups; q. 18, Willie Messino; q. 19, Joe Gagliano; q. 36, was he paid by Messino; q. 37, was he paid by Gagliano; q. 41, did he meet with Gagliano at the Bar Nazionale; q. 42, Messino.

Sarno.

q. 6, Messino; q. 7, Messino and Gagliano; q. 11, is he still a juice collector for Messino and Gagliano; q. 13, 20, 21, Messino; q. 26, did he take orders from Messino, Gagliano; q. 27, 28, is he employed my Jack Cerone.

Group V—Background.

Cardi.

q. 3, has he ever been arrested; q. 4, was he arrested for kidnaping and assault; q. 5, was he a juice collector or an enforcer from 1963 to the present; q. 11, did he

make juice collections from over 100 persons from 1963 to 1966 in the City of Chicago; q. 48, 49, 50, 51, 52, does he know why Ray Finnerman left his home in Skokie and went to Texas; q. 39, what was his gainful occupation from January 1, 1963, to date.

Sarno.

q. 3, did he resign or was he discharged from the police department; q. 4, was he arrested by the F. B. I. for theft of interstate shipments; q. 5, was he arrested for kidnaping, assault and robbery of one Joseph Weisphal; q. 15, did he make certain threats to the mother of Mr. Black, thereby frightening her; q. 17, did wave a pistol under the face of Mr. Black; q. 21, was he present when Messino threatened Mr. James with a baseball bat; q. 31, did Greenbaum leave town to avoid making juice payments to him; q. 33, did Philip Marzarello leave the city to avoid making further juice payments; q. 40, what his lines of gainful employment were since he left the Chicago Police Department.

The Immunity Act grants immunity sufficient to supplant the privilege in those specific transactions recited in Group I, but it does not further supplant the privilege in that it does not prevent the state from using "links" or "fruits" of those transactions specifically named to prosecute for another offense, either for criminal usury or any act of violence connected with the collection of the juice loans.

While the location of the "centers of activities" listed in Group II may be "things," the state, nevertheless, could go to these things and find "links" or "fruits" necessary to prosecute petitioners for other acts of criminal usury or violence under the Illinois Criminal Code. The same applies to Group III except that acquaintances are not "transactions, matters or things." The persons named in Group IV are not "transactions, matters or things"—

they are citizens. Nevertheless, they are those persons best knowledgeable to furnish information necessary to prosecute petitioners for not only acts of criminal usury, but acts of violence associated with the collection of the usurious loans. Further, in the event that these persons gave anonymous information to the police department as to other crimes, after petitioners testified, petitioners would have no way of knowing whether or not this information was the "fruits" or "links" of their compelled testimony. Group V supports the fears of the petitioners. The statute sufficient to supplant the constitution must remove the sanctions that generate the fears justifying the invokation of the privilege, *Ullmann* v. *United States*, 350 U. S. 422.

The policies of the privilege reflect many of our fundamental values and our most noble aspirations, *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 55. "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence," *Mapp* v. *Ohio*, 367 U. S. 656, 657, *Malloy* v. *Hogan*, 378 U. S. 1, 9. It would only be blinking at reality to find that in any subsequent prosecution petitioners would have the effective representation commanded by the Sixth Amendment—Illinois has no discovery rules in criminal cases. How then, in the event of subsequent prosecution, could petitioners, regardless of which party had the burden of proof, ascertain whether a subsequent prosecution was based on "links" or "fruits" of the compelled testimony, or even reply to the state's contention that the prosecution was based on "independent evidence." The Fifth Amendment is not "almost running into the Fourth Amendment," it is colliding head on with the Sixth Amendment.

Illinois has not as yet ruled on whether or not the state may prosecute on "independent evidence" after a person

has testified pursuant to the Immunity Act; and this question is still open in the United States Supreme Court, *Stevens* v. *Marks*, 383 U. S. 234, 244. In the absence of discovery provisions, regardless of who has the burden of proof, how is a citizen to determine whether or not the state is prosecuting on "independent evidence." To say that this matter could be determined at the trial level is not practical—it would only add to further "clogging" of the courts—endless continuances—a witness now refers to another witness as yet not subpoenaed. True, in any subsequent prosecution, petitioners would be entitled to a list of witnesses. However, their attorney or investigators, assuming that the petitioners could pay for the services of investigators, court reporters and attorneys, would themselves risk prosecution. Ill. Rev. Stat., Chapter 38, Section 32-4(b) provides that any party who, with intent to deter a party or witness from testifying, directly or indirectly, conveys to such witness any knowingly false information, is subject to a penalty up to one to three years in the penitentiary.

Further, the Immunity Act omits the phrase "or subjected to penalty or forfeitures." This provision is in the following six immunity statutes in 1967 Ill. Rev. Stat.: Chapter 5, Section 158, Marketing Fresh Fruits and Vegetables; Chapter 48, Section 501, On Employment Compensation; Chapter 67½, Section 173, State Housing Act; Chapter 67½, Section 278, Neighborhood Redevelopment Corp. Act; Chapter 100½, Section 4, Public Nuisance (Prostitution); and Chapter 111⅔, Section 65, Public Utilities. There can be no question that if petitioners had engaged in criminal usury or had used violence with reference to collecting loans, they would be subject to judgments, including punitive damages, in a civil suit where "malice is the gist of the action." Failure to pay these judgments

would subject petitioners to serve a period of six months in the County Jail pursuant to 1963 Ill. Rev. Stat., Chapter 77. Section 68. "The Illinois Insolvent Debtor Statutes, Ill. Rev. Stat., Chapter 77, Sections 4, 5, 68 (1963), in effect, permit the imprisonment of a judgment debtor if the judgment debt is the result of a civil action in which malice is the gist of the action," *Nichimen Co., Inc.* v. *Ashbach*, 352 Fed. 2d 899, 904 (C. A. 7th Circuit, 1965), and discharge under the Insolvent Debtors Act, Chapter 72, cannot be invoked, *White* v. *Youngblood*, 367 Ill. 633, 635 (1938). It is not claimed that the privilege embraces exposure to civil suits or punitive damages. It is contended that when a person may be committed to the penitentiary for a period of six months, for each one of a great many judgments, then the consequences of the compelled testimony are necessarily penal in character—his liberty is at stake.

The failure of Illinois to enact discovery procedures in criminal matters, when considered in connection with the vague provisions of the Immunity Act, does not comply with the federal standard of "fundamental fairness." Further, the examinations of the petitioners and the procedure followed by the state, following their sentence, do not comply with the federal standard of "fundamental fairness." There can be little doubt that the Commission, having some information from records previously seized and which were suppressed in the criminal court, sought to examine the petitioners with reference to any other suspected or unsuspected crimes, reminiscent of the procedure in the Star Chamber Sessions. Further, oral argument on the appeal to the Illinois Supreme Court was set for November 26, 1969. On November 10, 1969, each of the petitioners received another subpoena to testify before the Commission. They appeared and refused to testify. On January 5, 1970, the Commission filed another complaint before

the same trial judge in Case No. 70 L 61, in which the Commission recited that the petitioners had received summons on November 10, 1969, and refused to testify. The complaint further recited that petitioners' request for an injunction was denied on November 25, 1969, and further requested that petitioners be ordered to appear on January 10, 1970. (The Illinois Supreme Court's decision was filed on May 27, 1970.) The trial court, on January 12, 1970, entered an order directing the Commission to produce a copy of all records seized from the home of Cardi that were subsequently suppressed in the criminal court, within fourteen days, at the office of the attorney for petitioners. The Commission has to this day refused to comply with this order; no other action was taken by either side; and case No. 70 L 61 is still pending. The "rack and screw?"

Petitioners had some insight as to what was to follow in the original case, 66 L 1111 (A. 23, 24). The court ordered the petitioners to appear before the Commission a second time. The Commission prepared an order for the judge's signature authorizing the Commission to examine petitioners "but not limited to the questions previously propounded." The court correctly struck the phrase "including, but not limited to." (A. 23, 24.)

The implications of the questions, in the setting in which they were asked, demonstrated to an overwhelming degree that the questions might be dangerous because injurious disclosure could result in future state prosecution.

II.

MUST THE STATE AFFIRMATIVELY DEMONSTRATE TO RESPONDENTS, WHEN TESTIFYING PURSUANT TO THE ILLINOIS STATUTE, THAT AN IMMUNITY, AS BROAD IN SCOPE AS THE FIFTH AMENDMENT, IS AVAILABLE AND APPLICABLE TO THEM?

"The basic purposes that lie behind the privilege against self-incrimination do not relate to . . . but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load,' " *Tehan* v. *Shott*, 382 U. S. 406, 415—it is an expression of the moral striving of the community, *Malloy* v. *Hogan*, 378, U. S. 1, 9.

Where an immunity act (1) on its face is not sufficient to supplant the privilege (it does not prevent the use of "links" or "fruits" of the compelled testimony), and at the time of the compelled testimony Illinois had not interpreted the Immunity Act as being sufficient to supplant the privilege; (2) in a situation where a Grand Jury Act provides that a person shall not be prosecuted *for any offense* shown in *whole or in part* by such testimony, and such provisions have been held adequate to eliminate the privilege, *People* v. *Walker*, 28 Ill. 2d 585, 590 (1963), the legislature then amends an Immunity Act, about two years after the *Walker* case, but does not amend that part of the Immunity Act which provides "a person shall not be prosecuted for any transaction, matter or thing concerning which he gave answer;" (3) and the Illinois Constitution and Illinois Case Law are construed alike with the Fifth Amendment and the Federal Case Law applicable thereto, but Illinois, although considering Federal Case Law, will not construe an Immunity Act solely for the purpose of abridging the privilege, *People* v. *Newmark*, 312 Ill. 625, 632, and follows Federal Case Law to the effect that legislation cannot abridge the privilege, but the Immunity Act

itself must be so broad as to have the same scope and effect, *People* v. *Boyle*, 312 Ill. 586, 597 (1924); (4) in a state where the failure to provide adequate discovery procedures in criminal matters does not comply with the federal standards of "fundamental fairness" so that a citizen is unable to ascertain whether or not in any subsequent prosecution the "links" or "fruits" of the compelled testimony are the basis for a subsequent prosecution; (5) where a state has not as yet ruled upon whether or not the state may nevertheless use independent evidence in a subsequent prosecution, and from the implications of the questions it is clear that a state could sincerely believe that it was proceeding in a subsequent prosecution on independent evidence (anonymous information following the compelled testimony), and yet, in truth, be proceeding on the "links" and "fruits" of the compelled testimony, that a person would be in no position to controvert; and (6) in a state where a person may be confined to jail for six months for failure to pay a civil judgment where "malice is the gist of the action" and the Immunity Act does not contain the phrase "or subjected to penalty or forfeiture," although six other Illinois statutes do contain this latter phrase, then Illinois must affirmatively demonstrate to a person that an immunity as broad in scope as the Fifth Amendment is available and applicable to them, *Stevens* v. *Marks*, 383 U. S. 234, 246.

CONCLUSION.

It is hereby submitted that for the reasons advanced, the decision of the Illinois Supreme Court be reversed.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions.

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE II SECTION 10, ILLINOIS STATE CONSTITUTION:

No person shall be compelled in a criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

1967 ILL. REV. STAT., CHAPTER 38:

Referred to as the Immunity Act.

203-1. Legislative intent.] § 1. It is the intent of the General Assembly, recognizing the frequent subversion of governmental, political and economic institutions through the influence of organized crime, (a) to set up adequate facilities for investigating and establishing the facts and general background relating to organized crime and to individual crimes insofar as they have a bearing on organized crime, whether the act or intent constituting the same, or both, occurs within or without the State so long as such organized crime or individual crimes affect the public safety, public peace, public health, public morals, public welfare or public justice of the State; (b) to evaluate the extent to which organized crime exists within the borders of the State, and the degree of efficiency of law

enforcement agencies in dealing with it; and (c) to make such facts, general background and evaluation available to the legislative, executive, judicial and administrative bodies and officials of the State, to the end that they may better perform their respective functions in preserving the public safety, public peace, public health, public morals, public welfare and public justice of the State.

This Act, and the jurisdiction of the Commission created thereby, is not intended to be in derogation of the jurisdiction of any Grand Jury of any County of the State.

203-10. Organized or syndicate crimes.] § 10. The Commission has power to investigate all fields of organized or syndicate crime, including, but without limiting the generality thereof, prostitution, narcotics, liquor, gambling, subversive activities, lotteries, counterfeiting and tax frauds.

203-14. Refusal to answer or produce evidence—Order of court—Immunity.] § 14. In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, *that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer* or produced evidence. He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to

testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States. As amended by act approved Aug. 24, 1965. L. 1965, p. 3459.

1967 Ill. Rev. Stat. Chapter 38:

Referred to as the Grand Jury Act.

§ 106-1. **Granting of Immunity.)** In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.

§ 106-2. **Effect of Immunity.)** Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.

1965 Ill. Rev. Stat. Chapter 38:

Criminal Usury.

39-1. § 37-1. **Criminal Usury.)** Any person commits criminal usury when, in exchange for either a loan of money or other property or forbearance from the collection of such a loan, he knowingly contracts for or receives from an individual, directly or indirectly, interest, discount or other consideration at a rate greater than 20% per annum either before or after the maturity of the loan. Added by act approved Aug. 10, 1965. L. 1965, p. ....., H. B. No. 149.

39-2. § 37-2. **Penalty.)** A person convicted of criminal usury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned. Added by act approved Aug. 10, 1965. L. 1965, p. ....., H. B. No. 149.

1967, ILL. REV. STAT. CHAPTER 77:

Malice Gist of Action Statutes.

4. Execution.] § 4. The person in whose favor any judgment, as aforesaid, may be obtained, may have execution thereon in the usual form, directed to the proper officer of any county, in this state, against the lands and tenements, goods and chattels of the person against whom the same is obtained, or against his body, when the same is authorized by law. Upon the filing in the office of the clerk of any court in any county in this state of a transcript of a judgment rendered in any other county of this state, execution may issue thereon in said county, in like manner as in the county where originally obtained. As amended by act approved July 9, 1963. L. 1963, p. 2678. Effective Jan. 1, 1964.

[§ 2. This Act shall take effect on January 1, 1964, but only as to judgments rendered after December 31, 1963.]

5. Execution against body.] § 5. No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action, and except when the defendant shall refuse to deliver up his estate for the benefit of his creditors. [As amended by act approved July 11, 1935. L. 1935, p. 937.]

68. Arrest—Summary hearing—Order—Continuance—Notice—Maximum period of imprisonment—Schedule.] § 65. When a debtor is arrested by virtue of an execution against his body, he shall be immediately taken before the court out of which the execution issued. The court shall proceed in a summary manner to hear the evidence, if any, as to whether the execution against the body should have been issued. If upon such hearing the court finds that the body execution was not properly issued under the provisions of this

Act it shall order that the body execution be quashed and that the judgment debtor be discharged from custody; but such discharge shall not affect the right of the judgment creditor to collect the judgment otherwise than by execution against the body of the judgment debtor. If, in a case where the body execution was issued under the provisions of Section 62,[1] the court finds that the allegations of the affidavit required by that Section have been proved or if, in a case where the judgment was obtained for a tort and there was a special finding that malice was the gist of such action as required by Section 5 of this Act,[2] the court finds that the body execution was properly issued in such case, it shall order that the judgment debtor be conveyed to the county jail and kept in safe custody until he shall satisfy the judgment or be discharged according to law. The court may continue such hearing from time to time and in such case it shall either remand the judgment debtor into the custody of the sheriff or other officer of the court or allow him to give bond for his appearance from time to time until the proceedings are concluded, such bond to be in such sum and with such security as the court directs.

Immediately upon the arrest of the defendant the officer making the same shall give notice thereof and of the time and place where the judgment debtor will be brought before the court to the plaintiff, his agent or attorney.

No person imprisoned under the provisions of this act shall be imprisoned for a longer period than six months. Provided, however, that no person shall be released from imprisonment under this act who neglects or refuses to schedule in manner and form as provided by "An Act concerning insolvent debtors", approved April 10, 1872, as amended.[3] As amended by act approved May 6, 1957. L. 1957, p. 151.

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1. Section 65 of this chapter.
2. Section 5 of this chapter.
3. Chapter 72.

Miscellaneous Statutes.

1967 ILL. REV. STAT.:

Marketing Fresh Fruits and Vegetables Act

Chapter 5 § 158. **Exemption from prosecution based on testimony given.]** § 20. No person shall be excused from attending, testifying, answering any lawful inquiry or producing any documentary evidence before the Director or any employee of the Department designated by the Director in obedience to a subpoena of the Director or any such designated employee in any cause or proceeding based upon or growing out of any alleged violation of this Act upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forefeiture. By[1] no natural person shall be prosecuted *or subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he is compelled, under oath, to testify or produce evidence, documentary or otherwise, before the Director or such designated employee in obedience to the subpoena of the Director or any such designated employee in such cause or proceeding; provided that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Unemployment Compensation Act

Chapter 48 § 501. § 1001. **Testimony—Immunity.** No person shall be excused from testifying or from producing any papers, books, accounts, or documents in any investigation or inquiry or upon any hearing, when ordered to do so by the Director, Board of Review, or member thereof, or any deputy, Referee, or a representative of the Director, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or*

1. Probably should read "But".

subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before any such person or Board of Review: Provided, that such immunity shall extend only to a natural person, who, in obedience to a subpoena, and after claiming his privilege, shall, upon order, give testimony under oath or produce evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

State Housing Act

Chapter 67½ § 173. **Testimony of witnesses.]** § 23. No person shall be excused from testifying or from producing any papers, books, accounts or documents in any investigation or inquiry or upon any hearing ordered by the board when ordered to do so by the board or by any member, officer, or employee of the Board, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or subjected to any penalty or forfeiture,* for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the board or a member, officer or employee thereof; provided that such immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under oath or produces evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Neighborhood Redevelopment Corp. Act

Chapter 67½ § 278. § 28. **Testimony—Immunity.)** No person shall be excused from testifying or from producing any papers, books, accounts or documents in any investigation or inquiry or upon any hearing ordered or held by the Redevelopment Commission, when ordered to do so, upon the ground that the testi-

mony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Redevelopment Commission; Provided, that such immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under oath or produces evidence, documentary or otherwise, under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Public Nuisance (Prostitution) Act

Chapter 100¼ § 4. **Plaintiff may file interrogatories —Failure to answer—Answer as evidence.]** § 4. The plaintiff at any time before, but not later than ten days after the filing of the answer, unless further time be granted by the court, may file interrogatories in writing concerning matters material to the allegations of the complaint or respecting the ownership of the property upon which it is claimed the nuisance is maintained. A full answer to each interrogatory under the oath of the defendant shall be filed with the clerk within ten days after a copy of the interrogatories has been served upon him or his solicitor. For a failure to so answer interrogatories the court may strike the answer to the complaint from the files and enter default and a decree pro confesso, and a rule to answer interrogatories may be entered and the court may punish a defendant for contempt of court for a refusal to obey such rule. No person shall be excused from answering interrogatories under oath on the ground that an answer may tend to criminate him or subject him to a penalty or forfeiture. The answer shall be evidence against, but not on behalf of, the defendant; it shall not be used against him in any criminal proceeding nor shall he be prosecuted *or subjected to a penalty or forfeiture* for or on account of any transaction, matter or thing disclosed by him in such answer responsive to the interrogatories.

Public Utilities Act

Chapter 111⅔ § 65. **Testimony—Immunity.]** § 61. No person shall be excused from testifying or from producing any papers, books, accounts or documents in any investigation or inquiry or upon any hearing ordered by the Commission, when ordered to do so by the Commission or any commissioner, assistant commissioner, or officer of the Commission, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted *or subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Commission or a commissioner, assistant commissioner, or an officer of the Commission: Provided, that such immunity shall extend only to a natural person, who in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise under oath. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Supreme Court of the United States

October Term, 1971

No. [illegible]

ALBERT BARNS and CHRIS CARIS,

Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 565

ALBERT SARNO and CHRIS CARDI,

Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Illinois in this case is reported at 45 Ill. 2d 473 (1970).

JURISDICTION

The petition for a writ of certiorari to the Supreme Court of Illinois was filed on August 20, 1970, pursuant

to Title 28 U.S.C. § 1257(3). On March 1, 1971, this Court granted the writ limited to questions one and three as presented by the petition.

QUESTIONS PRESENTED FOR REVIEW

Questions one and three as set forth in the petition are:

1. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

3. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The fourteenth amendment, section one provides in part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ill. Rev. Stat. (1965), Ch. 38, § 203-14 provides:

> "In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

STATEMENT OF THE CASE

The factual circumstances of this case are not in dispute. During 1968, the Illinois Crime Investigating Commission was conducting hearings pursuant to its investigation of organized crime, and, more precisely, of the "juice rackets" in Illinois. On February 8, 1968, petitioners Albert Sarno and Chris Cardi were ordered to appear and answer questions before the Commission on February 24, 1968. The petitioners appeared before the Commission on that date and in response to each question asked of them, invoked the fifth amendment privilege against compulsory self-incrimination. (A. 3-18).

The Commission on March 21, 1968, filed a motion in the Circuit Court of Cook County requesting the entry of an order granting each of the petitioners immunity from future criminal prosecution "for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence" pursuant to Ill. Rev. Stat. 1965, Ch. 38, § 203-14. The motion detailed the appearance before the Commission on February 24, 1968, of each of the petitioners and their refusal to answer questions based upon the fifth amendment privilege. The motion also incorporated each of the questions asked of the petitioners. (A. 18). The petitioners filed a Motion to Dismiss or in the Alternative to Strike on April 9, 1968. (A. 19). The Commission replied on April 22, 1968. (A. 22). Petitioners' alternative motions were denied on July 26, 1968 and they were ordered to answer the petition. The answer was filed December 27, 1968. (A. 23).

The Court on January 30, 1969, entered an order pursuant to Ill. Rev. Stat. 1965, Ch. 38, § 203-14 requiring Sarno and Cardi to appear before the Commission and answer questions. The order further provided "that each of the said Defendants/Respondents be and he is hereby

released from all liability to be prosecuted or punished on account of any matter to which he shall testify before the said Commission, except for perjury or contempt of Court by the said Respondents/Defendants before the said Commission." (A. 24).

The petitioners with counsel appeared before the Commission on February 28, 1969. Both men refused to answer the questions previously propounded, invoking the privilege against self-incrimination. (A. 24-51). Counsel for the Commission read the immunity order to each petitioner at the conclusion of questioning and gave each man a third opportunity to answer. (A. 50-51, R. 265-66).

The Crime Commission filed a petition for a rule to show cause why each of the petitioners should not be held in contempt on April 7, 1969. (A. 51). The petitioners filed their answer on May 6, 1969. On May 9, 1969, the court adjudged each petitioner in contempt and sentenced each to six months imprisonment in the County Jail. (A. 52).

The petitioners appealed this judgment and sentence to the Supreme Court of Illinois, which affirmed the decision of the lower court on May 27, 1970. See *Illinois Crime Investigating Commission* v. *Albert Sarno, et al.*, 45 Ill. 2d 473 (1970) (A. 53-56).

Petitioners then filed a petition for writ of certiorari to the Supreme Court of Illinois on August 20, 1970. This Court granted certiorari on March 1, 1971. (A. 57).

SUMMARY OF THE ARGUMENT

Petitioners Sarno and Cardi were granted immunity from future prosecution "for or on account of any transaction, matter or thing" concerning which they gave answer during hearings conducted by the Illinois Crime Commission as part of its investigation of the "juice"

rackets in Illinois. Both men appeared before the Commission on two occasions and each was given three opportunities to answer the Commission questions. Each persisted in his refusal to answer based upon the fifth amendment privilege against compulsory self-incrimination. The contempt citations upon which this case is grounded followed.

At every juncture of the proceedings before the Commission, the State clearly demonstrated to the petitioners the existence of a valid grant of immunity coextensive with the fifth amendment privilege. The State took affirmative action, obtaining a court order granting to each petitioner total immunity from future prosecution for crimes to which his compelled testimony relates. The petitioners themselves admit that the State intended to grant them immunity from future criminal prosecution. They argue only that the immunity was insufficient to protect them from prosecution for crimes indirectly established by their compelled testimony. However, the record clearly reflects that the State of Illinois accurately, forthrightly and persistently demonstrated to the petitioners the existence of a complete grant of transactional immunity specifically applicable to them.

The constitutional guarantee against compulsory self-incrimination is fully supplanted by immunizing a witness from the use of his compelled testimony either directly or indirectly in a subsequent criminal prosecution. The Illinois statute, however, imposes the greater governmental restraint of barring all future prosecution of the immunized witness for crimes established by his direct testimony or its fruits. Prior decisions of this Court and of the Supreme Court of Illinois mandate the conclusion that the petitioners were granted full transactional immunity and therefore, may be compelled to testify.

ARGUMENT

I.

A STATUTORY GRANT OF IMMUNITY WHICH PROTECTS THE WITNESS FROM PROSECUTION "FOR OR ON ACCOUNT OF ANY TRANSACTION, MATTER OR THING CONCERNING WHICH, IN ACCORDANCE WITH THE ORDER HE GAVE ANSWER OR PRODUCED EVIDENCE" SECURES THE WITNESS FROM COMPULSORY SELF-INCRIMINATION.

Petitioners Sarno and Cardi ground their entire argument before this Court on the invalid assumption that the statutory grant of immunity which they received "was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned."[1] Premising their position on this assumption, they then argue that their continued refusal to testify based upon their fifth amendment privilege was proper since ". . . it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions."[2] The question of whether the immunity granted by the Illinois Crime Investigating Commission statute (Ill. Rev. Stat. 1965, Ch. 38, § 203-14) is sufficient to supplant the privilege against compulsory self-incrimination is dispositive of petitioners' argument. We turn to that issue.

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1. Questions Presented, Question 3, Petition 2; Pet. Brief 3 (question 1), A. 57.

2. Ibid.

The Crime Commission statute provides that in any hearing or examination by the commission in which a person answers a question or produces evidence under the compulsion of a court order entered after the witness has refused to answer or produce evidence on the ground of self-incrimination, and "[a]fter complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, *that person shall not be prosecuted for or on account of any transaction matter or thing concerning which, in accordance with the order, he gave answer or produced evidence.*"[3] (emphasis added). This provision grants the petitioners immunity from future prosecution by the State of Illinois for any criminal offense established by their answers to the Commission questions or for any criminal offense established through the use of their answers as an investigative tool. The petitioners thus were granted total immunity from future prosecution for any crime to which their compelled testimony relates—*transactional immunity.* Contrary to petitioners' argument, prior Illinois decisions interpreting identical or similar language establish this statute as a bar to future criminal prosecution for any offense concerning which the immunized witness is compelled to testify.

In *People* v. *Boyle,* 312 Ill. 586 (1924), the Supreme Court of Illinois reviewed the contempt conviction of a witness called to testify before a county grand jury investigating bribery charges. The witness, having invoked his state constitutional privilege against self-incrimina-

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3. Ill. Rev. Stat., 1965, Ch. 38, § 203-14.

tion[4] was granted immunity pursuant to section 35 of the Bribery Act (Smith's Stat. 1923, p. 666) which provided in relevant part that any material witness whose testimony might incriminate him could be "released for all liability to be prosecuted or punished on account of any matter to which he shall be required to testify . . . and if he shall testify, such order shall forever after be a bar to any indictment, information or prosecution against him for such matter." After receiving a grant of immunity pursuant to this provision, Boyle still refused to testify before the grand jury and was held in contempt.

On appeal, Boyle asserted that "any answers which he might make to said questions, or any of them, would tend to connect him with the crime of conspiracy to bribe a juror, or conspiracy to do an illegal act injurious to the administration of public justice, or to commit a felony or conspiracy at common law, or would show facts which would tend to put him in criminal contempt of court for interfering with or attempting to bribe a juror . . . and

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4. Article 2, Section 10 of the Constitution of Illinois (1870) provided that:

> "No person shall be compelled in any criminal case to give evidence against himself."

The state constitutional privilege is identical to that provided by the federal Constitution. Thus, although the federal privilege was inapplicable in state proceedings prior to 1964, federal precedent was determinative in interpreting the state constitutional privilege. See: Halpin v. Scotti, 415 Ill. 104, 107 (1953); People v. Grod, 385 Ill. 584 (1944). Therefore, the state court decisions antedating Malloy v. Hogan, 378 U.S. 1 (1964) apply with equal force to the petitioners' present claim under the federal constitutional privilege.

that the immunity granted to him by the court would not release him from liability to be prosecuted for such offenses." (312 Ill. at 593-94). Considering the history and policies of the privilege against self-incrimination and prior state and federal cases interpreting the privilege, the Supreme Court of Illinois stated:

> "Thus, if the legislature by the enactment of an immunity statute has provided that the witness shall not be liable to criminal prosecution for any transaction necessarily disclosed by the testimony which he is required to give and for any transaction concerning which such testimony constitutes an essential link in a chain of evidence against him, the immunity afforded by the statute is thereby made coextensive with the protection afforded him by the Constitution and becomes a complete substitute for it, and he is required to testify." (312 Ill. at 597).

The court went on to conclude that "in no other way than by giving complete amnesty can an immunity statute be sustained, for in no other way can the act become a guaranty as complete as the constitutional privilege taken away." (312 Ill. at 603).

The Illinois Court had occasion to review the constitutional sufficiency of the same statute once again in 1931. *People* v. *Rockola,* 346 Ill. 27. Following the rule established in *Boyle, supra.,* the court stated: "Unless protected by an authorized immunity order no witness can be required to give testimony which either directly or indirectly tends to incriminate him or to form a link in a chain of circumstances that might result in punishment for crime." (346 Ill. at 31).

The immunity provision of the Illinois Cigarette Tax Act, Ill. Rev. Stat. 1951, Ch. 120, par. 453.10, was scrutinized and upheld in *Halpin* v. *Scotti,* 415 Ill. 104 (1953).

That statute provided in relevant part: "no person shall be prosecuted or subjected to any criminal penalty for, or on account of, any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Department or an officer or employee thereof . . . ." (415 Ill. at 108). This provision is substantially identical in language to the immunity provision of the Crime Commission Act. In *Halpin*, the Court reviewed the sufficiency of the immunity under both the federal and state constitutional protections against self-incrimination, and found that:

> "The plain language of section 10a clearly renders appellee immune to prosecution or criminal penalty for anything concerning which he may truthfully give evidence. The reason for the asserted constitutional privilege thus ceases, and it cannot be claimed. The statute, being coextensive in its immunity with the privilege guaranteed by our State and Federal constitutions, does not offend that fundamental law, and its application here cannot be invalid as a violation of that privilege." (415 Ill. at 109).

And most recently, in *People* v. *Walker* 28 Ill. 2d 585 (1963), the Supreme Court of Illinois considered the requisite scope of an immunity statute sufficient to supplant the privilege against compulsory self-incrimination. In *Walker*, the Court construed the grand jury witness immunity provision contained in Ill. Rev. Stat. 1961, Ch. 38, par. 714.1 which provided that "such witness be released from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify * * *; and such order shall forever after be a bar to any indictment, information or prosecution against the witness for any felony or misdemeanor shown in whole or part by such testimony . . ." (28 Ill. 2d at 589-90).

Walker had pleaded guilty to an indictment charging him with the burglary of a church. At his probation hearing and before a subsequent grand jury, he named two men as his accomplices. One of these men was indicted for the burglary and Walker was called as a witness for the state at the trial. He invoked his privilege against self-incrimination and refused to testify. On motion of the prosecutor, the court entered an immunity order in the language of the above-quoted statute. Walker then testified, recanting his earlier sworn statements naming the two men as accomplices.

Walker was indicted on five counts of perjury and perjury by contradictory statements. He was tried and found guilty. On appeal from that judgment, he asserted that his perjury conviction violated his privilege against compulsory self-incrimination. Mr. Justice Schaefer, writing for an unanimous court, reversed the conviction stating: "The statute eliminates the constitutional privilege against self-incrimination by a grant of immunity that bars a future prosecution of the witness for any offense 'shown in whole or part by such testimony.' With the possibility of self-incrimination thus eliminated, the witness may be compelled to testify." (28 Ill. 2d at 590).

These precedents clearly reflect the settled Illinois law. A grant of immunity, to be valid in Illinois must protect the witness from future prosecution by the State for any offense shown in whole or in part by his compelled testimony. This was the rule applied by the state supreme court to the facts of the instant case.

The opinion below accurately reflects that the Supreme Court of Illinois construed the immunity provision of the Crime Commission statute as a grant of transactional immunity. The court, referring to section 203-14 stated:

"That section grants immunity to the defendants from further prosecutions." *Illinois Crime Investigating Commission* v. *Sarno, et al.*, 45 Ill. 2d 473, 476 (1970) (A. 56). Hence, a grant of transactional immunity by state authorities in Illinois is required to supplant the state or federal constitutional privilege within Illinois.[5] *People* v. *Boyle, supra; People* v. *Walker, supra.* The petitioners received such a grant of total immunity.

The petitioners make much of a minor difference in phraseology between the grand jury witness immunity statute construed in *Walker*, and the Crime Commission statute. Their argument, however, ignores the manifest language of the Crime Commission statute and is merely a smokescreen for a meritless point.

The statute construed in *Walker* and which the petitioners admit is sufficient to supplant the privilege in Illinois (Pet. Br. 10) provided that a grant of immunity pursuant to the statute bars prosecution of the witness for any offense "shown in whole or in part" by his testimony. (28 Ill. 2d 589-90.) Petitioners argue that the Crime Commission statute providing "that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, *he gave answer,*" (emphasis added by petitioners) grants a narrower immunity than the grand jury act. They attempt to foster this theory by referring to the fact that the Crime Commission statute was amended subsequent to the Court's opinion in *Walker*, but the quoted language was left unchanged. This, they reason, is a "clear indication that the legislature had no intention to grant to a witness an immunity suf-

5. The petitioners admit they fear only future prosecution by the State of Illinois. (Petition 9; Pet. Br. 12, 14, 15-16).

ficient to supplant the privilege found adequate in *Walker.*" (Pet.'s Br. 10-11). Such an argument is a futile attempt to substitute their theories of this case for the plain meaning of the statutory language and to create a legislative intent for which support is totally lacking in the history of the Crime Commission statute.

Petitioners argue that since the *Walker* statute immunizes the witness for any offense "shown in whole or in part" by his testimony, and the Crime Commission statute covers offenses concerning which "he gave answer," that the *Walker* statute grants immunity including offenses shown both by the direct testimony and by the fruits of that testimony, but that the Crime Commission provision includes only offenses covered by the direct testimony of the witness (to which "he gave answer"). Petitioners reason that such a grant of immunity does not include the fruits of the compelled testimony and therefore, is invalid.

The petitioners have emphasized a minor phrase in the Commission statute while completely ignoring the relevant wording which is dispositive of their position. The Commission statute grants immunity *"for or on account of* any transaction, matter or thing concerning which * * * he gave answer." (emphasis added). This provision immunizes the witness from criminal prosecution for offenses shown by his direct testimony ("for * * * any transaction, matter or thing") and for offenses which can only be established through the use of the direct testimony as an investigative tool i.e., the fruits of the testimony ("or *on account of* any transaction, matter or thing concerning which * * * he gave answer"). This interpretation is dictated by both prior Illinois precedents

and by decisions of this Court construing identical statutory language.

In *Brown* v. *Walker*, 161 U.S. 591 (1896), this Court reviewed the sufficiency of a federal statutory grant of immunity which provided in part that "no person shall be prosecuted or subjected to any penalty or forfeiture *for or on account of any transaction, matter or thing, concerning which he may testify*, or produce evidence documentary or otherwise. . . ." (161 U.S. at 594) (emphasis added). This Court stated that "[t]he act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty. . . ." And "while the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are therefore of the opinion that the witness was compellable to answer, and that the judgment of the court below must be affirmed." (161 U.S. at 601, 610).

In *Ullmann* v. *United States*, 350 U.S. 422 (1956), this Court upheld the Immunity Act of 1954 over a challenge that the grant of immunity from future prosecution *"for or on account of any transaction, matter, or thing concerning which he is compelled*, after having claimed his privilege against self-incrimination, to testify or produce evidence. . ." (350 U.S. at 424) (emphasis added) was insufficient to supplant the privilege. Three years later, in *Brown* v. *United States*, 359 U.S. 41 (1959) this Court reviewed the same language contained in a federal grand jury witness immunity statute and found the law settled in that such a provision confers immunity from prosecution coextensive with the privilege against self-incrimination. "It is thus clearly too late in the day to question the constitutional sufficiency of the immunity provided . . ." (359 U.S. at 46).

The statutes upheld in *Brown* v. *Walker*, *supra.*; *Ullmann* v. *United States*, *supra.*; and *Brown* v. *United*

States, supra., are identical to the Illinois Crime Investigating Commission provision herein challenged.[6] There is but one conclusion: the Illinois immunity statute affords protection both to the compelled testimony and to the fruits of that testimony. Section 203-14 of the Illinois statute completely protects "against the use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."[7] The statute is a bar to future prosecution "for or on account of any transaction, matter or thing" concerning which a witness is compelled to testify before the Commission.[8] Since the statute confers transactional immunity, the provision totally meets the constitutional requirements of the privilege. There is no infirmity.

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6. See also: Reina v. United States, 364 U.S. 507 (1960) (Narcotic Control Act of 1956, 18 U.S.C. § 1406, containing identical language, interpreted); 8 Wigmore on Evidence §§ 2282, 2283 (McNaughten Rev. 1961).

7. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892). See also: Hoffman v. United States, 341 U.S. 479 (1951); Blau v. United States, 340 U.S. 159 (1950).

8. Petitioners argue that omission of the phrase "or subject to penalty or forfeitures" from the immunity provision renders the act invalid because they may be left exposed to a civil damage suit which might result in up to six months imprisonment for failure to pay the civil judgment. This argument is inapt.

The words "penalty or forfeiture" when used in immunity legislation refer only to "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him and though they may be civil in form, are in their nature criminal for Fifth Amendment purposes." *Boyd* v. *United States*, 116 U.S. 616, 634 (1886). In these cases, money

The controversy concerning a precise delimitation of the scope of the privilege has been renewed in recent years by the decision of *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). Prior to *Murphy*, the only definitive statement of the requirements of a valid statutory immunity sufficient to supplant the privilege appeared in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). There this Court, in holding Section 860 of the federal Revised Statutes unconstitutional, stated:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which

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liability or property forfeiture is predicated solely upon a finding of the owner's wrongful or criminal conduct and is not the result of a separate civil suit for damages incurred as a result of a private wrong. Because of their essentially criminal nature, the Fifth Amendment anti-incrimination privilege has been held applicable to penalty or forfeiture proceedings. *United States* v. *United States Coin and Currency*, —— U.S. ——, 91 S. Ct. 1041 (April 5, 1971); *One* 1958 *Plymouth Sedan* v. *United States*, 380 U.S. 693 (1965). See also *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968). Therefore, a person compelled to give evidence pursuant to a grant of immunity would be protected by that immunity from penalties and forfeitures as well as the direct criminal liability established by his compelled testimony. This would be true whether transactional or use immunity is found to be constitutionally required, since under either requirement the fruits of compelled testimony as well as the direct evidence given by the witness must be protected.

> the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. *In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.*" (142 U.S. at 585-86).

This concept has come to be known as transactional immunity. It is premised on the theory that once the privilege has been properly invoked, the only adequate protection for a witness compelled by the government to testify pursuant to a grant of immunity is to bar that government from ever prosecuting the witness for any crime established in whole or in part by his testimony.[9] This is the theory adopted by the Illinois legislature and embodied in the Illinois Crime Investigating Commission statute.

Opposing this interpretation of the privilege is the concept which forbids the use in a subsequent criminal proceeding of testimony or evidence given pursuant to a grant of immunity either as direct evidence of a criminal offense or as an investigative tool—*use immunity*. In effect, use immunity creates an exclusionary rule of evidence akin to that presently followed in cases involving coerced confessions and unreasonable searches and

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9. With this Court's holding in Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 77-78 (1964) that the constitutional privilege against self-incrimination "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law," a grant of immunity by one jurisdiction to which the privilege is applicable is effective to protect the witness in that jurisdiction as well as in all other jurisdictions to which the privilege also applies.

seizures. And, unlike transactional immunity, it is not an absolute bar to future prosecution for crimes about which the immunized witness has testified, although in practice it may have that effect. Immunity from use of compelled testimony or evidence and its fruits is all that is constitutionally required to supplant the fifth amendment privilege. This view is supported by the express language of the amendment, by the history and policies of the privilege, and by prior decisions of this Court. And further, such a conclusion is not precluded by the holding of *Counselman*.

The express language of the fifth amendment precludes any governmental compulsion resulting in a person appearing as a witness against himself in a criminal case, either by compelling the person to testify or to produce evidence of his own guilt. Under a completely literal reading of the provision then, no immunity statute is sufficient to supplant the privilege. This interpretation has some support among historians and in dissenting opinions of this Court. See: *Piccirillo* v. *New York*, —— U.S. ——, —— 91 S. Ct. ——, 27 L. Ed. 2d 596, 606 (1971) (Mr. Justice Brennan dissenting); *Brown* v. *Walker*, 161 U.S. 591, 610, 628 (1896) (Mr. Justice Shiras and Mr. Justice Field dissenting); *Ullmann* v. *United States*, 350 U.S. 422, 449 (1956) (Mr. Justice Douglas and Mr. Justice Black dissenting). However, this view has never gained wide acceptance. Decisions of this Court adhere to the principle first enunciated in *Counselman* that a statutory grant of immunity is valid if it is coextensive with the scope of the privilege against self-incrimination. *Murphy* v. *Waterfront Commission of New York Harbor*, *supra*, at 54; *Ullmann* v. *United States*, *supra*; *Brown* v. *Walker*, *supra*. Thus, the courts and

commentators in recent years have limited their discussion to the scope of the fifth amendment privilege."

The protection against compelling a person to be a witness against himself in a criminal proceeding represents the ultimate recognition of our legal system as accusatorial, rather than inquisitorial in nature. That is, "Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy* v. *Hogan*, 378 U.S. at 8. This Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) focused sharply on the importance of the privilege in our constitutional scheme.

> "We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our

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10. Singer, "State Grants of Immunity—The Problem of Interstate Prosecutions Prevention," 58 J. Crim. L. C. & P. S. 218 (1967); Sobel, "The Privilege Against Self-Incrimination 'Federalized,'" 31 Brooklyn L. Rev. 1 (1964); Wendel, "Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion," 10 St. Louis U. L. J. 327 (1966); Note, "Immunity Statutes and the Constitution," 68 Colum. L. Rev. 959 (1968); Note, "State Immunity Statutes in Constitutional Perspective," 1968 Duke L. J. 311; Note, "In Re Koota: The Scope of Immunity Statutes," 61 Nw. U. L. Rev. 654 (1966); Note, "Counselman, Malloy, and Murphy, and The States' Power to Grant Immunity," 20 Rutgers L. Rev. 336 (1966); Comment, "Federalism and The Fifth: Configurations of Grants of Immunity," 12 U.C.L.A. L. Rev. 561 (1965).

> accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent 'unless he chooses to speak in the unfettered exercise of his own will'." (384 U.S. at 460) (citations omitted).

Thus, the privilege is a mainstay of our legal system which must be accorded a liberal construction in favor of the right which it was intended to secure. *Counselman* v. *Hitchcock, supra.*

The fifth amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

With the exception of the final clause, the amendment embodies a series of safeguards for a person faced with criminal prosecution. The amendment does not prohibit criminal prosecution. Rather, it recognizes man's right to liberty as so fundamental that when that right is threatened, as by an impending criminal prosecution, basic safeguards must be interposed between the individual and the prosecuting authority to preserve the balance between the rights of the individual and the responsibilities of government.

Two analogies are useful in pinpointing the form which the safeguard prohibiting compulsory self-incrimination takes. The first is to the rule now followed in both state and federal proceedings in cases involving coerced confessions. The second analogy is to cases arising under the fourth amendment prohibition of unreasonable searches and seizures. Both are relevant in determining the scope of the privilege against self-incrimination—the coerced confession cases because they arise under the same privilege and thus constitute precedent which may not be disregarded, and the search and seizure cases because they involve very similar if not identical considerations.

As early as 1897, this Court in *Bram* v. *United States*, 168 U.S. 532, recognized that

> "In criminal trials, in Courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the Constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

With the decision of *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the substantive standards underlying the privilege are equally applicable to proceedings in the state courts. Thus, in state as well as

> "In the federal Courts, the requisite of voluntariness is not satisfied by establishing merely that the Confession was not induced by a promise or a threat . . . [*A*] *confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.*" *Bram* v. *United States*, 168 U.S. at 532. (emphasis added).

See also: *Miranda* v. *Arizona*, 384 U.S. 436, 462 (1966); *Ziang Sun Wan* v. *United States*, 266 U.S. 1, 14-15 (1924).

In reaching that conclusion, this Court discussed the historical reasons giving rise to the adoption of the fifth amendment and of the safeguards which the provision was intended to secure and found that "the generic language of the amendment was but a crystallization of the doctrine as to confessions . . . [A] maxim, which in England was a mere rule of evidence, became clothed in this Country with the impregnability of a constitutional enactment."[11] The implementation of this constitutional safeguard in cases involving an involuntary confession is thus particularly relevant in determining how the same safeguard should be implemented when a government—state or federal—otherwise compels testimony, as by a grant of immunity.

The decisions of this Court have established that no conviction based either in whole or in part upon an involuntary confession is valid. *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Malinski* v. *New York*, 324 U.S. 401 (1945); *Bram* v. *United States*, *supra*. However, criminal prosecution for the crime to which the confession relates is not barred. Instead, the government has the burden of proving its case by independent evidence, or evidence untainted by the involuntary confession. See *Miranda* v. *Arizona*, 384 U.S. at 479.

The same rule is appropriate where testimony is compelled from a witness by a grant of immunity. The analogy is inescapable. Both an involuntary confession and compelled testimony are admissions by an individual which he has been forced to make either by threats or promises or by a grant of immunity and the threat of a contempt citation if he refuses to answer. The question no longer is whether a "person may be compelled

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11. Bram v. United States, 168 U.S. at 543, 545 (1897).

to be a witness against himself in a criminal case" but rather, what remedy will reinstate the effectiveness of the privilege for that person. Once the government employs compulsion, does restoration of the privilege require the barring of all future prosecution of the individual concerning matters about which he has been forced to waive his privilege or is exclusion from evidence of the compelled admissions and the fruits thereof sufficient.

This Court has adopted the latter course both in the confession cases and in those instances where an unconstitutional search and seizure has occurred. See: *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Historically, the provisions prohibiting compelled self-incrimination and unreasonable searches and seizures intertwine to protect the individual from:

> "All invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property***.
>
> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation*** [of those amendments]."

Boyd v. *United States,* 116 U.S. 616, 630 (1886) as quoted in *Mapp* v. *Ohio,* 367 U.S. 643, 646-47 (1967). Both protections are constitutional in nature and both are enforced by exclusionary rules of evidence. The protection thus afforded is best expressed in *Mapp* when the

Court says that "'conviction by means of unlawful seizures and enforced confessions*** should find, no sanction in the judgments of the Courts**,' and that such evidence *'shall not be used at all'.*" (367 U.S. at 648) (citations omitted) (emphasis added)

This result is most applicable where testimony is compelled pursuant to a grant of immunity.[12] Both the form of compulsion and the proceedings in which the compelled evidence is given are matters of public record. There is no opportunity for such nonpublic State action as a custodial police interrogation or the search of a person's home. Any other reading of the privilege is unnecessarily burdensome.[13]

This Court has recognized and adopted use immunity by its opinion in *Murphy* v. *Waterfront Commission of New York Harbor, supra.* Determining the required effect of a state grant of immunity on a subsequent federal prosecution, this Court held "that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state

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12. Singer, supra, at 220, fn. 22.

13. See: 8 Wigmore on Evidence § 2283 (McNaughton Rev. 1961):

"Immunity statutes providing against 'use' of the compelled testimony could easily and properly be construed to proscribe not only *direct* use of the evidence, but *indirect* use as well. That is, they could be construed to proscribe use of the 'fruit of the tree', a doctrine sufficing in the areas of search and seizure and wiretap. (footnote omitted). Such a construction would render the statutes valid, the immunity being as broad as, but not wastefully broader than, the privilege." (footnote omitted) (emphasis by the author).

law and a federal witness against incrimination under state as well as federal law." 378 U.S. at 77-78. Immediately following this holding, the opinion continued "we must now decide what effect this holding has on existing state immunity legislation." 378 U.S. at 78. The Court then considered the holding in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), as a statutory interpretation compelled by the facts of that particular case; namely that the *Counselman* statute:

> " 'Could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court . . .,' id., at 564,

that it:

> 'could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted . . .,' *ibid.*,

and that it:

> 'affords no protection against the use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.' Id., at 586." (378 U.S. at 78-79).

In view of this statutory deficiency in not prohibiting the use of immunized testimony as an investigative tool, this Court in *Counselman* was forced to find that the statute was not as broad in scope as the fifth amendment privilege and, therefore, invalid.

Murphy applied the *Counselman* holding to the companion holdings of *Malloy* and *Murphy* that "the same

standards must determine whether [a witness'] silence in either a federal or state proceeding is justified' *Malloy* v. *Hogan, ante,* at 11," and further held "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless *the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.*" 378 U.S. at 79 (emphasis added). If the same standards apply to the states and to the federal government, this holding must have the same effect whether only one or several of these jurisdictions are involved. In either case, both the witness and the government are left "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U.S. at 79. The Constitution requires no more.[14]

The efficacy of use immunity is further supported by the position in which the prosecuting authority is placed following a grant of immunity and the testimony of the witness. In any subsequent criminal prosecution of the

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14. Contrary to the position taken by Mr. Justice Brennan in his dissent in *Piccirillo* v. *New York, supra,* there is no constitutional justification for a different rule applicable only in the jurisdiction granting immunity. His position in that case does not appear to be grounded upon a constitutional requirement but rather upon a practical consideration which assumes a disinterested and non-political spirit of cooperation among the law enforcement officials of a single jurisdiction. There is no basis for the assumption that officials in the granting jurisdiction will work more or less closely with officials in that or another jurisdiction and such a consideration certainly is insufficient reason for promulgating a separate constitutional rule in cases involving a single sovereignty which is not otherwise compelled.

immunized witness, the government has the burden of proving that its evidence is untainted by the immunized testimony. See *Murphy* v. *Waterfront Commission of New York Harbor, supra,* at 79, fn. 18. This requirement is an additional protection afforded the immunized witness which is not accorded in the analogous search and seizure cases. On a motion to suppress evidence allegedly seized in violation of the fourth amendment, the defendant has the burden of proving the illegality of the search and seizure. Requiring the government in immunity situations to prove an independent source for its evidence will operate as a complete bar to future prosecution in some cases. However, both the government and the witness are left in the same position as though the witness had invoked his fifth amendment privilege and refused to testify in those cases where the prosecutor can prove an independent basis for prosecution. Use immunity thus maintains the balance between the individual's liberty and government's responsibility which it is the purpose of the fifth amendment privilege to protect.[15]

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15. The concept of use immunity also finds support in decisions of this Court subsequent to Murphy. Thus in Garrity v. New Jersey, 385 U.S. 493 (1967), the use in a subsequent criminal prosecution of incriminating statements compelled by the threat of job forfeiture was forbidden. Mr. Justice Douglas, speaking for the majority, stated:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." (385 U.S. at 500).

Regardless of whether this Court adopts the view that use immunity is sufficient to displace the fifth amendment privilege or requires the absolute bar to future prosecution imposed by transactional immunity, the statute which the petitioners herein question suffers no infirmity. The Crime Commission provision grants transactional immunity. Both the express language of the act and prior interpretations of similar and identical provisions by the Supreme Court of Illinois and by this Court support the conclusion that the statute prohibits future criminal prosecution of an immunized witness for crimes established by his direct testimony and its fruits. At every stage of the proceedings below, the State clearly represented its intention to grant each of the petitioners immunity pursuant to this statute. The petitioners were warned that their continued refusal to answer the Commission questions following the grant of immunity con-

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And see: Spevack v. Klein, 385 U.S. 511, 520, 529 (1967) (Mr. Justice Harlan, dissenting). Accord: Stewart v. United States, —— F. 2d —— (9th Cir. 1971) (No. 71-1212, 71-1213), cert. granted sub. nom. Kastigar v. United States, —— U.S. —— (1971), 39 U.S. L. W. 3511 (May 17, 1971); Uniform Sanitation Men Assoc., Inc. v. Commissioner of New York, 426 F. 2d 619 (2nd Cir. 1970); United States v. Shillitani, 345 F. 2d 290, 293 (2nd Cir. 1965), vacated on other grounds, 384 U.S. 364 (1966); Application of Longo, 280 F. Supp. 185 (S.D. N.Y. 1967); Ciffo v. McClosky, 273 F. Supp. 604 (S.D. N.Y. 1967); New Jersey State Commission of Investigation v. Zicarelli, 55 N.J. 249, 261 A. 2d 129 (1970), prob. juris. noted, —— U.S. —— (1971), 8 Crim. L. Rptr. 4159. Contra: Piccirillo v. New York, 400 U.S. 548, 562 (1971) (Mr. Justice Brennan, dissenting); In The Matter of Korman, —— F. 2d —— (7th Cir. 1971) (No. 71-1328); In Re Grand Jury Testimony of Joanne Kinoy, —— F. Supp. —— (S.D. N.Y. 1971) (No. M-11-188).

stituted the offense of contempt for which they could be punished criminally. They chose to remain silent. They may make this choice but they may not escape its consequences. Having been granted complete immunity from future prosecution for crimes related to their compelled testimony, their continued silence was contumacious and criminally punishable. There is no error.

II.

THE STATE AFFIRMATIVELY DEMONSTRATED TO THE PETITIONERS A VALID, AVAILABLE IMMUNITY SUFFICIENT TO SUPPLANT THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

Petitioners Sarno and Cardi refused to answer questions after receiving a grant of immunity releasing them from all liability to be "prosecuted for or an account of any transaction, matter or thing concerning which, in accordance with the order, [they] gave answer or produced evidence." They assert without argument or explication that the State must affirmatively demonstrate to them that the immunity conferred is coextensive with the constitutional privilege forbidding compulsory self-incrimination before they may be required to testify on pain of contempt. Accepting that such a showing should be made to a silent witness asserting the privilege before that witness may be required to speak does not resolve the issue, however.[16] The petitioners reassert the

16. The necessity of an affirmative showing of a valid immunity occurs only in cases where the witness remains silent following immunization and the government then attempts to punish his conduct as contumacious. The wit-

substantive points which they have argued on appeal in support of their refusal to answer the Commission questions. Thus buttressing their position, they flatly assert that the required affirmative showing of a valid grant of immunity was not made to them and they therefore may not be held in contempt for their refusal to answer. The issue thus inferentially raised is whether a State when confronted with an immunized witness who questions the extent of the immunity conferred, must meet a standard of proof in demonstrating to the witness the validity of the granted immunity. Such a theory is based upon a misinterpretation of the holding of *Stevens* v. *Marks*, 383 U.S. 234 (1966) and finds no support in either precedent or policy.

In *Stevens* v. *Marks, supra*, this Court reviewed the contempt conviction of a New York City policeman who, after having signed a waiver of immunity (without the benefit of counsel) and appeared before a grand jury, attempted to assert his fifth amendment privilege and refused to answer questions propounded to him by the grand jury. Finding that Stevens had effectively withdrawn his initial waiver, this Court also noted that the State had maintained throughout the case and had repre-

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ness thus would have a complete defense to the contempt charge if he demonstrates either an invalid statutory grant of immunity or some misrepresentation of the availability of a valid immunity.

The problem does not exists where the witness is compelled and does testify or produce evidence without voluntarily waiving the privilege. In that situation, "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." Adams v. Maryland, 347 U.S. 179, 181 (1954).

sented to Stevens that no immunity was available or applicable to him.[17] In that context this Court held that Stevens' efforts to withdraw the waiver of his fifth amendment privilege having been successful, ". . . and that in the absence of an immunity provision clearly made applicable to him, petitioner could properly stand on his privilege and refuse to answer potentially incriminating questions." (383 U.S. at 244)

In reaching that conclusion, this Court relied on *Raley* v. *Ohio*, 360 U.S. 423 (1959). A reference to *Raley* clarifies the precise meaning and scope of the holding in *Stevens* and consequently, the requirements which Illinois must meet in the instant case. In *Raley*, the appellants had appeared before a state investigative commission and been asked to answer questions. The chairman of the commission indicated to the witnesses that the privilege against self-incrimination was available and applicable to them. Other members of the commission and the commission's counsel indicated that no immunity provision was applicable to the witnesses. At the time, Ohio had an "automatic" immunity statute which removed any valid basis for a claim of privilege during the commission proceedings and made refusal to answer an offense, of which the appellants in *Raley* were convicted.

In that context this Court found that while there was no evidence indicating that the commission had tried to deceive the witnesses, the action of the State in representing to the witnesses that a privilege was clearly applicable to them and then convicting them of a criminal offense for exercising that privilege constituted "the most

17. 383 U.S. at 245.

indefensible sort of entrapment by the State . . . A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them." 360 U.S. at 438. (citations omitted).

From the circumstances in both *Raley* and *Stevens*, it becomes apparent that this Court considered one aspect of those cases as determinative—the issuance of vague or contradictory commands to a citizen may not support a criminal conviction for failure to comprehend or follow those dictates. See 383 U.S. at 245. Upon that underlying premise this Court found that "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." 383 U.S. at 246.[18]

Thus, the requirement of an affirmative showing means that a state may not mislead a witness as to the consequences of his answer or failure to answer. In conferring immunity, the state must demonstrate clearly its intent to immunize the witness and thus displace the fifth amendment privilege. The state is not required to meet possible substantive arguments which later may be promulgated by the witness on appeal from a contempt conviction for his refusal to answer. Such a result would place an impossible burden on the state and is contrary to prior decisions of this Court. See: *Scull* v. *Virginia*, 359 U.S. 344 (1959). Thus, the state has ful-

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18. In support of this view, see Stevens v. Marks, 383 U.S. 234, 246, 251 (Mr. Justice Harlan dissenting) fn. 7.

filled its burden when it clearly demonstrates to a witness that a grant of immunity intended to supplant the fifth amendment privilege is being conferred upon the witness and that a continued refusal to answer questions asked pursuant to this immunity grant is criminally punishable.

Illinois has met this test in the instant case. Both petitioners were at all times represented by their own, retained counsel. After their first appearance before the Commission and their refusal to answer questions based upon the fifth amendment privilege against self-incrimination, the Commission filed a formal motion setting forth a verbatim transcript of the questions asked of the petitioners and requesting an order granting immunity to Sarno and Cardi. Both men filed responsive pleadings to this motion accepting the basic premise that the State intended to grant them immunity, but contesting the limits of that immunity.

Following the grant of immunity, both men again appeared before the Commission. They were asked the same questions a second time and they again refused to answer. At the close of questioning, counsel for the Commission read to each witness the immunity order entered on January 30, 1969. This order contained the grant of immunity and the proviso that the witness was still subject to criminal sanction for perjury or contempt of court committed before the Commission.[19] The witness was then

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19. After propounding the questions designated in the immunity order to each witness, counsel for the Crime Commission stated:

"MR. ZAGEL: Mr. Cardi, I will now read to you portions of a signed order, signed by Judge Edward

given a third opportunity to answer the Commission questions. Each man again refused to answer.

At every step of the proceedings which resulted in the contempt citations herein questioned, the Commission clearly indicated to the petitioners that they had each been granted immunity pursuant to the Crime Commission statute. The Commission further informed Sarno

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J. Egan, on January 30, 1969. I am holding the order in my hand. The pertinent part reads:

'That each of the said respondents, to-wit, Chris Cardi, Patsy Ricciardi and Albert Sarno, is hereby order to be and appear before the said Commission on such date or dates and at such place or places as the said Commission may direct, provided that at least five days' written notice be served upon their respective attorneys, and to then and there answer the questions previously propounded to him and attached to the petition.

'The Court further orders that each of the said defendant-respondents be and he is hereby released from all liability to be prosecuted or punished on acts of any matter to which he shall testify before the said Commission except for perjury and contempt of court by the said respondent-defendants before the said Commission.'

Now, Mr. Cardi, I will inform you now, as I am sure you are well aware, that the questions asked of you by Mr. Flaum were the questions previously asked of you. And I would also inform you that Mr. Flaum and I, as counsel for the Commission, will recommend to the Commission that the Commission proceed against you and ask that the Court jail you for contempt of court.

Now, in light of that statement, do you wish to reconsider your position and answer any of the questions previously asked of you today?

and Cardi that their continued refusal to answer was a criminally punishable offense. The record firmly establishes that at all times during the Commission proceedings—the time of the contumacious conduct—"the voice of the State presently speaking to the [petitioners]"[20] clearly and accurately demonstrated the intent to confer a valid grant of immunity upon the petitioners. The State can do no more.

THE WITNESS: I refuse to testify on the grounds that I might incriminate myself." (Witness Cardi, R. 265-66; Witness Sarno, A. 50-51, R. 286-87).

20. Raley v. Ohio, 360 U.S. at 439.

CONCLUSION

In view of the foregoing arguments, the respondent respectfully requests this Court to affirm the decision of the Supreme Court of Illinois.

Respectfully submitted,

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Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted] 69 - 4

JOSEPH ARTHUR ZICARELLI,

Appellant

—v.—

NEW JERSEY STATE COMMISSION OF INVESTIGATION,

Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

[redacted] 70 - 7

ALBERT SARNO and CHRIS CARDI,

Petitioners

—v.—

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent

ON CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 91

JOSEPH ARTHUR ZICARELLI,

Appellant,

—v.—

NEW JERSEY STATE COMMISSION OF INVESTIGATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 565

ALBERT SARNO and CHRIS CARDI,

Petitioners,

—v.—

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

ON CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide, nonpartisan organization engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been particularly concerned with those societal values embodied in the Fifth Amendment's Privilege Against Self-Incrimination.

The Fifth Amendment Privilege plays a central role in our accusatorial system of justice. It safeguards the individual against overbearing inquiries by the State. Yet, as reflected in these cases, it is once again under attack by legislatures and the courts.

The purpose of this brief is to identify the policies underlying the Privilege and to demonstrate that the requirement of full transactional immunity is the minimally tolerable erosion of the fundamental right of silence protected by the privilege.

Question Presented

This brief is addressed solely to the question of whether the privilege against self-incrimination requires that the State grant full transactional immunity before it can compel a witness to testify.

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* Letters of consent to the filing of this brief from the attorneys for the respective parties have been filed with the Clerk.

ARGUMENT

Summary of Argument

The Fifth Amendment was intended and has been construed to confer an absolute right to remain silent when subjected to incriminating inquiries. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In this respect, the values protected by the Fifth Amendment dovetail with the right of privacy embodied in the Fourth Amendment, as this Court recognized almost a century ago in *Boyd* v. *United States*, 116 U.S. 616 (1886). Together these guarantees afford a private enclave into which the state may not intrude, physically or inquisitorially. Accordingly, *any* legislative arrangement by which a man is compelled to speak is constitutionally suspect. The validity of any immunity statute must be judged against these premises.

In *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) this Court held that only complete transactional immunity is an adequate displacement of the right to remain silent. *Counselman* embodied a studied compromise between the theory that no device could be used to compel self-incrimination and the uncertainties of "use" immunity schemes. Since *Counselman*, transactional immunity has been held to be part of our "constitutional fabric" as the minimally acceptable erosion of the Privilege. Those Justices who opposed the *Counselman* Rule did so not because it afforded too much, but because it granted too little to compensate for compelled self-incrimination. See *Brown* v. *Walker*, 161 U.S. 591 (1896); *Ullmann* v. *United States*, 350 U.S. 422 (1956).

This Court's decision in *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) is not a retreat from the *Counsel-*

man rule. *Murphy* was an *expansion* of Fifth Amendment protection, holding that one sovereign could make no use whatsoever of testimony compelled by another. *Murphy* did not disturb the settled rule that as between a witness and the sovereign which forces him to relinquish his privilege, complete transactional immunity is required. See, *Stevens* v. *Marks*, 383 U.S. 234 (1965); *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). Finally, anything less than full transactional immunity places too great a practical burden on the witness to insure that any future prosecution was not based on tainted evidence.

I.

Constitutional framework: The Fifth Amendment privilege safeguards the right to remain silent.

We begin our analysis of the issue in these cases by suggesting to the Court that the Fifth Amendment has always been thought to afford individuals the cherished right to remain silent. Accordingly, *any* device, be it immunity statute or truncheon, which operates to breach that silence and compel a man to confess criminal conduct runs afoul of the purpose of the constitutional privilege and impairs the societal policies which that privilege seeks to further.

As this Court has noted many times, the privilege was incorporated into the Constitution at a time when the oath *ex officio* utilized by England's Star Chamber and High Commission was recent history. John Lilburn's historic battle against such oaths led to their repeal in England.

The Fifth Amendment privilege was intended to have the same effect here. It was designed to safeguard a man's right to resist compulsion applied in an attempt to force him to reveal past criminal conduct. See, *Miranda* v. *Arizona*, 384 U.S. 436, 458-60 (1966). And the inquiries were usually directed at the "crimes" of political or theological dissent. In effect, the privilege was intended to prevent the state from rummaging through the closets of the mind in search of the secrets contained therein.

In this respect, the values safeguarded by the Fifth Amendment privilege dovetail with those protected by the Fourth Amendment and together provide a right of privacy against governmental intrusion. The intimate relationship between these two constitutional safeguards was clearly enunciated almost a century ago in *Boyd* v. *United States*, 116 U.S. 616 (1886). The case involved a statute designed to compel the production of incriminating documents, and the defendant objected on both Fourth and Fifth Amendment grounds. Both claims were sustained. This Court quoted at great length from the historic English decision in *Entick* v. *Carrington*, 19 How. St. Tr. 1029. Lord Camden had surveyed the principles of the common law and concluded: "[i]t is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle." (Quoted in *Boyd* v. *United States*, *supra*, at 629) The Court summed up these principles in the following manner,

> The principles laid down in this opinion affect the very essence of constitutional liberty and security.

> They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. *Id.* at 630.

The Court concluded that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." *Id.* at 631-32.

This recognition, that the Fourth and Fifth Amendments and the interests they protect "run almost into each other"

and prevent extorting a man's oath, has been repeatedly reflected in the Court's decisions. For example, in *Malloy* v. *Hogan*, 378 U.S. 1 (1964) the Court concluded that the constitutional privilege guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Id.* at 8. The history of the privilege and the policies it serves was eloquently characterized by Chief Justice Warren,

> Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." United States v. Grunewald, 233 F2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 353 US 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, Murphy v. Waterfront Comm'n, 378 US 52, 55-57, note 5 (1964); Tehan v. Shott, 382 US 406, 414-415, note 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev 1961), to respect the inviolability of the human personality, our accusa-

tory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. Chambers v. Florida, 309 US 227, 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Miranda* v. *Arizona*, *supra* at 460.

II.

Full transactional immunity is the minimally acceptable substitute for the Fifth Amendment privilege to remain silent.

We have set forth this analysis of the purposes of the Fifth Amendment privilege because any immunity statute must be evaluated against the premise that the privilege safeguards personal privacy and the right to remain silent. Since this Court first considered the validity of immunity statutes in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), there have been essentially two theories competing for acceptance. One theory holds that *no* immunity statute is constitutionally sufficient to displace the privilege and compel a man to speak. This view was enunciated in 1807 by Mr. Chief Justice Marshall, almost commanded a majority in *Brown* v. *Walker*, 161 U.S. 591 (1896), and was articulated by Justice Douglas, joined by Justice Black in *Ullmann* v. *United States*, 350 U.S. 422 (1956).

This absolute position (with which we fully concur) has not prevailed. Instead, this Court has adopted the rule that a grant of immunity from prosecution is the minimally acceptable substitute for the privilege. However, the doctrinal tension has always been between the minority view, that the privilege and its underlying policies affords the complete right to silence, and the prevailing view that statutes which grant transactional immunity are sufficient. Thus, the debate has always been between silence and transactional immunity, not between transactional immunity and something less. The transactional immunity rule has prevailed not over the argument that it afforded too much protection, but over the objection that it gave too little.

A. *Historical Background—The pre-Counselman Understanding.*

The view that the Fifth Amendment privilege affords an absolute right of silence with regard to incriminating inquiries is supported by the language of the privilege and the history of its origins. Justice Brennan has surveyed the history as follows,

> Historians have noted that the clause itself is absolute and may not originally have been viewed as allowing the government to compel men to incriminate themselves if it only promised not to prosecute them for the crimes revealed:
>
> "The clause by its terms also protected against more than just 'self-incrimination,' a phrase that had never been used in the long history of its origins and development. The 'right against self-incrimination' is short-hand gloss of modern origin that implies a re-

striction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him.

* * * * *

"The state courts of the framers' generation followed the extension of the right to cover self-infamy as well as self-incrimination, although the self-infamy rule eventually fell into disuse." L. Levy, Origins of the Fifth Amendment, 427, 429 (1968). *Piccirillo* v. *New York*, 27 L. Ed. 2d 596, 606 n. 7 (1971) (dissenting opinion).

The purpose of the privilege, as reflected in its absolute language, was to guarantee that one need not speak at all concerning incriminating or infamous matters. This understanding is manifest in Mr. Chief Justice Marshall's decision in the trial of Aaron Burr,

. . . It is certainly not only a possible, but a probable, case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it might be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

> What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that might form a necessary and essential part of a crime, which is punishable by the laws . . .
>
> [I]n such a case, the witness must himself judge what his answer will be; and if he say, on oath, that he cannot answer without accusing himself, he cannot be compelled to answer. 1 *Burr's Trial*, 244-45.

Marshall's view, that the privilege afforded the right not to speak at all concerning incriminating matters, predated the modern immunity statutes, first enacted in 1857. Those resulted in so-called "immunity baths," which allowed witnesses to flock to Congress, confess their past indiscretions, and obtain freedom from prosecution. See Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568, 1571-72 (1963). These statutes were quickly supplanted by restrictive immunity provisions. But those provisions were not utilized for two decades until the passage of the Interstate Commerce Act. *Id.* at 1572-73. Investigations under that Act quickly led to this Court's decision in *Counselman* v. *Hitchcock, supra*, unanimously invalidating the immunity statute for not affording protection equivalent to the Fifth Amendment.

B. *Transactional Immunity—The Compromise Between the Right to Absolute Silence and the Uncertainties of "Use" Immunity.*

"[N]o statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States." *Counselman* v. *Hitchcock, supra,* at 585. That was the opinion of this Court when first confonted with the question of the constitutionality of a federal immunity statute.[1]

The statutory provision affording less than complete immunity was held to be constitutionally defective. Writing for a unanimous court, Justice Blatchford announced that "[i]t is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to be the same extent in scope and effect." *Id.* at 585. The Court held that the immunity provision did not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and was not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, "must afford absolute immunity against future prosecution for the offense to which the question relates . . . " *Id.* at 586.

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[1] The statute provided, in part, that:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. Act of Feb. 25, 1868, Rev. Stat. Sec. 860.

Although *Counselman* presented this Court with its first opportunity to examine the constitutionality of an immunity statute, the protection afforded to the witness was not unreasoned nor was it unnecessarily broad. Rather, the *Counselman* decision resulted from a compromise which attempted to balance the rights of the individual and the interests of the government without excessive sacrifice of the policy considerations underlying the privilege against self-incrimination.

The court in *Counselman* considered Chief Justice Marshall's suggestion, in the *Aaron Burr* case, that the privilege against self-incrimination was tantamount to a right to remain silent. Marshall, certainly not one to denigrate the interests of the state, nevertheless concluded that "the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punished by the laws" (quoted in *Counselman* v. *Hitchcock, supra,* at 566). The conclusion to be drawn from Marshall's position was that any compulsion to testify, regardless of the scope of the immunity provided, would erode the right to remain silent.

Antithetical to the Marshall equation, however, was the position that had been adopted by the New York Court of Appeals in *People* v. *Kelly,* 24 N.Y. 74 (1861). *Kelly* involved a New York immunity statute which compelled accomplice testimony but also prohibited the use of that compelled testimony in "any prosecution or proceeding civil or criminal." It was contended that this statute violated a provision of the New York Constitution which declared that "no person shall be compelled, in any criminal case, to be a witness against himself." The New York Court of Appeals upheld the constitutionality of the stat-

ute. The *Kelly* case subsequently served as the progenitor of a line of state decisions which, during the second half of the nineteenth century, validated the constitutionality of "use" immunity statutes.

A third position developed, however, which adopted a "well conceived middle path" between the suggestion that no immunity statute could be constitutionally coextensive with the privilege and the view that a "use" immunity provision could satisfy the requirements of the Fifth Amendment. This middle path was first announced in *Emery's Case*, 107 Mass. 172 (1871), which held that a witness could be compelled to testify but only if "first secured from future liability . . . as fully and extensively as he would be secured by availing himself of the privilege accorded by the Constitution." *Id.* at 185. This security, the court found, "cannot be accomplished so long as he [the witness] remains liable to prosecution criminally for any matters or causes in respect of which his testimony shall relate." *Ibid.* See also, *Cullen* v. *Comm.*, 24 Gratt 624 (Virginia, 1873) ("before [the constitutional privilege] can be taken away [by the Legislature], there must be absolute indemnity provided, nothing short of complete amnesty to the witness—an absolute wiping out of the offence as to him, so that he could no longer be prosecuted for it—would furnish that indemnity." *Id.* at 635; *State* v. *Nowell*, 58 N.H. 314 (1878) ("[t]he legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection must relieve him of all liabilities on account of the matters which he is compelled to disclose; otherwise, the statute would be ineffectual. He is to be secured against all liability to future prosecution as effectually as if he were wholly innocent.

This would not be accomplished if he were left liable to prosecution criminally for any matter in respect of which he might be required to testify." *Id.* at 315).

In adopting the doctrine represented by *Emery's Case*, that full prosecutorial immunity must be conferred, this Court was prompted substantially by the need to reconcile the constitutional validation of any immunity statute with the position adopted a few years earlier in *Boyd* v. *United States, supra. Boyd* had revealed the fundamental confluence between the Fourth and Fifth Amendments, demonstrating that they "run almost into each other." *Boyd* showed that both Amendments were essentially designed to protect the privacy and security of the individual from excessive incursions by the government. Justice Blatchford in *Counselman*, quoting extensively from the majority opinion in *Boyd*, was not unmindful of the essential importance of this "indefeasible right of personal security."

In sum, although the Court in *Counselman* attempted to satisfy the state's interest in seeking information, it sought not to sacrifice the individual's right of privacy and security. *Counselman* took the middle path between an unfettered right to remain silent and the substantial erosion of the Fifth Amendment which would have occurred by upholding the validity of use immunity statutes. The *Counselman* "compromise" indicated that immunity statutes would be upheld only so long as they provided full "prosecutorial" protection.

C. *Post-Counselman*: *Transactional Immunity Emerges as the Rule Over Frequent Objections That No Immunity Statute Can Displace the Privilege.*

In response to the constitutional requirements suggested by the opinion in *Counselman*, Congress enacted in 1893 a "transactional" immunity statute. See 27 Stat. at L. 443 (1893).[2] Three years later, a challenge to the validity of this statute reached the Supreme Court in the case of *Brown* v. *Walker, supra.* The Court by a narrow 5-4 vote upheld the constitutionality of the transactional immunity provision. Writing for the majority of the court, Justice Brown found that the transactional statute sufficiently protected a witness to satisfy the requirements of the Fifth Amendment. The majority reasoned that the Fifth Amendment privilege was susceptible of two interpretations. First, it could be construed literally to authorize a witness to refuse to incriminate himself. Such an interpretation would, in effect, mean that no one could be compelled to testify to a material fact in a criminal case unless by choice. The other construction would bar any prosecution related to the testimony given, because ". . . if no such prosecution be possible—in other words, if his testimony operate as a complete pardon for the offence to which it relates—a statute absolutely securing him such immunity from prosecution would satisfy the demands of the clause in question." 161 U.S. at 595. The majority concluded that "if the statute does afford . . . immunity against future prosecution the witness will be compellable to testify." *Id.* at 594.

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[2] The statute afforded protection not only against prosecution, but also against the witness being subjected to "a penalty or forfeiture."

Four Justices dissented. They objected to the statute not because it provided protection that was unnecessarily broad, but because the protection afforded by the transactional provision was not broad enough. They concluded that no immunity statute could displace the values protected by the Fifth Amendment.

Justice Shiras, with whom Justices Gray and White joined in dissent, reasoned that various historical and practical considerations undercut any immunity provision:

> It is too obvious to require argument that, when the people of the United States, in the 5th Amendment to the Constitution, declared that no person should be compelled in any criminal case to be a witness against himself, it was their intention, not merely that every person should have such immunity, but that his rights thereto should not be devested or impaired by any act of Congress. *Id.* at 610.

He further contended that "the very fact that the founders of our institutions, by making the immunity an express provision of the Constitution, disclosed an intention to protect it from legislative attack, creates a presumption against *any* act professing to dispense with the constitutional privilege." *Id.* at 621.

Shiras found the transactional statute deficient in many respects. First, the enactment did not really protect the witness from prosecution. It merely enabled the witness to plead the prior compulsion as a defense against a subsequent indictment. As Shiras demonstrated, under the statute the witness will have,

> been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of em-

> ploying counsel and furnishing the evidence to make good his plea. It is no reply to this to say that his condition, in those respects, is no worse than that of any other innocent man who may be wrongfully charged. The latter has not been compelled, on penalty of fine and imprisonment, to disclose under oath facts which have furnished a clue to the offense with which he is charged. 161 U.S. at 621-22.

Secondly, it is not "a matter of perfect assurance that a person who has compulsorily testified . . . will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design." *Id.* at 622. In addition, Shiras contended that under the statute, the witness is relinquishing his privilege of silence in exchange for which, by testifying, "he is subjected to the hazard of a charge of perjury." *Ibid.* Finally, Justice Shiras argued that the statute was deficient because "the effect of the provision . . . as a protection to the witness, is purely conjectural and uncertain." *Id.* at 627. Thus Shiras concluded that the transactional immunity statute did not fully supplant the right to remain silent. For it did not leave the witness in the same position as if he had never testified. According to the dissenting votes in *Brown* v. *Walker,* the transactional statute constituted an unconstitutional erosion of the Fifth Amendment.

While Justice Shiras attacked the practical sufficiency of immunity statutes, Justice Field in a separate dissenting

opinion adopted the position that no immunity statute, however broad in scope or closely drawn, could supplant the right against self-incrimination. According to Field, the Fifth Amendment was intended to afford to the witness "a shield of absolute silence." And, said Field, "[n]o different protection from that afforded by the amendment can be substituted in place of it." *Id.* at 630. Field further contended that "[t]he amendment also protects [the witness] from all compulsory testimony which would expose him to infamy and disgrace, though the facts might not lead to criminal prosecution." *Id.* at 631. Certainly no statute could sufficiently immunize an individual from the "essential and inherent cruelty of compelling a man to expose his own guilt" and from public disapprobation once that person has admitted to the commission of an illegal or immoral act. Field therefore recurred to a formidable line of authority which contended that no statutory enactment could infringe upon the individual's unfettered right to remain silent and the concomitant right that the individual should suffer no penalty for his silence.

The transactional immunity standard suggested by *Counselman* and solidified by *Brown* v. *Walker* has been consistently reaffirmed as the maximum erosion of the right to remain silent that will be tolerated by the Fifth Amendment.

The issue as to the necessary scope of an immunity statute was raised in *Hale* v. *Henkel,* 201 U.S. 43 (1906). In that case a witness had refused to testify before a grand jury and was therefore cited for contempt. The witness contended that the transactional immunity, under which he was being offered protection, was not sufficiently broad to supplant his privilege. This court, however, upheld the

contempt citation and reasserted the transactional standard promulgated by *Counselman* and by *Brown* v. *Walker*.

Further induration of the *Counselman* rule was accomplished by Justice Brandeis in *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924). Writing for a unanimous court, Brandeis held that Congress could not compel a bankrupt individual to relinquish his Fifth Amendment right to remain silent unless it provided "complete immunity from a prosecution." *Id.* at 42. And in *United States* v. *Murdock*, 284 U.S. 141 at 149 (1931)[8] this court again declared that:

> The principle established is that full and complete immunity against prosecution by the government compelling the witness is equivalent to the protection furnished by the rule against compulsory incrimination. [Citing for support of the above proposition] *Counselman* v. *Hitchcock*, 142 U.S. 547; *Brown* v. *Walker*, 161 U.S. 591; *Jack* v. *Kansas*, 199 U.S. 372; *Hale* v. *Henkel*, 201 U.S. 43.

United States v. *Monia*, 317 U.S. 424 (1943) also presented the Court with the opportunity to review and to reaffirm the *Counselman* rule. Again the Court concluded that *Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege." *Id.* at 428. Even in dissent, Justice Frankfurter reaffirmed the rulings in *Counselman* and in *Brown* v. *Walker*. In discussing the *Brown* decision, Frankfurter conceded that "[t]here was no in-

[8] To the extent that *Murdock* held that fear of state prosecution did not justify a refusal to answer questions in an inquiry by federal officials, that holding was overruled by *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964).

dication of any belief that Congress had given anything more than it had to give—and indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution required." *Id.* at 434. In *Adams* v. *Maryland,* 347 U.S. 179, 182 (1954) Justice Black, delivering the opinion of the Court, stated that: "in *Counselman* v. *Hitchcock* . . . this Court held that an act not providing 'complete' immunity from prosecution was not broad enough to permit a federal grand jury to compel witnesses to give incriminating testimony."

Finally, in *Ullmann* v. *United States,* 350 U.S. 422 (1956), the court was again called upon to deal with the issue of the constitutionality of a transactional immunity provision and to review the line of cases validating such legislation. The statute at issue in *Ullmann* was the Immunity Act of 1954, 68 Stat. 745, 18 U.S.C. (Supp. II) Sec. 3486, which effectively compelled the testimony of a witness, in any case, "involving any interference with . . . the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy . . ."[4]

Justice Frankfurter, writing for a majority of the Court, upheld the constitutionality of the statute and characterized the standard set forth in *Brown* v. *Walker* as "part

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[4] The legislation also provided that:

> [N]o such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

This statute was typical of the federal immunity statutes until the passage of the Organized Crime Control Act of 1970, 18 U.S.C. Secs. 6001-6003.

of our constitutional fabric." Frankfurter discussed the development of the doctrine promulgated in *Brown* v. *Walker*, and he emphatically reasserted the precedential firmness of that ruling:

> . . . in Counselman v. Hitchcock, 142 US 547 a unanimous Court had found constitutionally inadequate the predecessor to the 1893 statute because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony. It was with this background that the 1893 statute, providing complete immunity from prosecution, was passed and that Brown v. Walker was argued and decided. As in Counselman, appellant's numerous arguments were presented by James C. Carter, widely acknowledged as the leader of the American bar. The Court was closely divided in upholding the statute, and the opinions reflect the thoroughness with which the issues were considered. Since that time the Court's holding in Brown v. Walker has never been challenged; the case and the doctrine it announced have consistently and without question been treated as definitive by this Court, in opinions written, among others, by Holmes and Brandeis, JJ. See, e.g., McCarthy v. Arndstein, 266 US 34, 42; Heike v. United States, 227 US 131, 142. The 1893 statute has become part of our constitutional fabric . . . Shapiro v. United States, 335 U.S. 1, 6. Ullmann v. United States, supra, at 436-38.[5]

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[5] In a footnote, Justice Frankfurter briefly summarized the arguments of James C. Carter as Carter contended that the transactional immunity statute was inadequate to supplant the right to

Justices Douglas and Black dissented. They advocated adoption of the view of the *Brown* dissenters "that the right of silence created by the Fifth Amendment is beyond the reach of Congress." *Id.* at 440.

After noting that the disabilities imposed upon one forced to reveal the type of information about political associations sought in *Ullmann* were similar, if not more egregious, than the "forfeitures" involved in *Boyd* v. *United States, supra,* Justice Douglas' opinion observes that "[w]isely or not, the Fifth Amendment protects against the compulsory self-accusation of crime without exception or qualification." *Id.* at 443. It does so to interdict three kinds of mischief. The first is the risk of prosecution

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remain silent. That summary of Carter's arguments is recited herein:

> He urged that the statute left the witness in a worse condition because it did not abrogate the crime for which he was given immunity; that the constitutional safeguard goes toward relieving the witness from the danger of an accusation being made against him while the statutory immunity forces him to supply evidence leading to an accusation and provides only a means for defense; that the statute puts a heavy burden on petitioner, if he is indicted, to prove that he had testified concerning the matter for which he was indicted; that a citizen is entitled to the very thing secured to him by the constitutional safeguards and not something which will probably answer the same purpose; that the statute subjects him to the infamy and disgrace from which he was protected by the constitutional safeguard; that the statute did not protect him from prosecution for a state crime; that even if it were so interpreted, Congress had no power to grant such protection; that the immunity granted was too narrow since it only extended to matters concerning which he was called to testify and not to all matters related to the testimony given; that to be able to claim the privilege the witness would virtually have to reveal his crime in order that the court could see that the statute failed to protect him; and finally that the statute was an attempt to exercise the power of pardon which was a power not delegated to Congress. 350 U.S. at 437 fn. 13.

and all the attendant uncertainties and disabilities discussed by Mr. Justice Shiras in *Brown* v. *Walker*. Second, the privilege is "a safeguard of conscience and human dignity and freedom of expression as well." *Id.* at 445. The Framers of the Constitution intended to provide more than just protection against prosecution or conviction; they created a "federally protected right to silence." *Id.* at 446. English and colonial history, commencing with the trial of John Lilburn, gave content to the privilege and demonstrated that one of its "great purposes" was "to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will." *Id.* at 448-49. Finally, "this right of silence, this right of the accused to stand mute" is designed to protect against compulsory testimony which would expose the accused to infamy and disgrace, to "practical outlawry". *Id.* at 449-50. Justice Douglas concluded his review of the purposes of the Fifth Amendment privilege as follows:

> The critical point is that the Constitution places the right of silence *beyond the reach of government.* The Fifth Amendment stands between the citizen and his government. *Id.* at 454 (emphasis in original).

The dissent by Justices Douglas and Black represents a persistent and persuasive strain of judicial authority which continues to maintain that even the transactional immunity standard constitutes an excessive and intolerable erosion of the Fifth Amendment.

In sum, from *Counselman* through *Ullmann* there was no authority whatever for the proposition that something less

than full transactional immunity could adequately supplant the Fifth Amendment privilege. Transactional immunity has consistently been regarded as the minimal protection that could be afforded to a witness. To the extent that there was any dissent from the *Counselman* rule, such opposition has traditionally argued that transactional immunity did not provide enough protection. Until *Murphy* v. *Waterfront Commission, supra,* it was never seriously contended that *Counselman* provided too much protection when measured against the Fifth Amendment right to remain silent.

III.

Where one state jurisdiction is involved, transactional immunity is the necessary and proper requirement, and *Murphy* v. *Waterfront Commission* is not to the contrary.

The recent suggestion that the Fifth Amendment only requires the inquiring sovereign to grant use immunity in order to abrogate the witness' privilege is premised on certain language in *Murphy* v. *Waterfront Commission, supra.* See, *Uniformed Sanitation Men's Assn. Inc.* v. *Commissioner of Sanitation,* 426 F.2d 619 (2d Cir. 1970); *Kastigar* v. *United States,* —— F.2d ——, 39 L.W. 2562 (9th Cir. 1971), *cert. granted,* 39 U.S.L.W. 3511. But *Murphy,* properly read, is consistent with the view that as between the witness and a state nothing less than full transactional immunity will satisfy the Fifth Amendment.

In *Murphy,* the inquiring jurisdiction had offered the witness full transactional immunity in exchange for his testimony. The witness protested that under the then-existing rule of dual sovereignty, he was not protected against prosecution by the federal government or by any

Feldman v. *United States*, 322 U.S. 487 (1944); *United* other states. See *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *States* v. *Murdock, supra.* Agreeing with the petitioner, this Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79. In so holding, this Court discarded the dual sovereign doctrine. Considerations of federalism had formed the basis of that doctrine: the inapplicability of the Fifth Amendment's right against incrimination to the states, the existence of the "silver platter" doctrine allowing use of evidence unconstitutionally seized by state authorities in a federal criminal trial, the inability of the states to grant immunity from prosecution by either the federal or other state governments, and the need of the federal government and the states for broad powers of investigation to effectively carry out their duties of regulating and preventing crime. See *Jack* v. *Kansas*, 199 U.S. 372 (1905); *Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Feldman* v. *United States, supra; Knapp* v. *Schweitzer, supra;* Note, *In re Koota: The Scope of Immunity Statutes*, 61 Nw. U. L. Rev. 654, 657, n. 5 (1966).

However, once the Court determined in *Elkins* v. *United States*, 364 U.S. 206 (1960), that evidence seized unconstitutionally by state authorities could not be used in federal criminal trials over the defendant's timely objection and in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment right against self-incrimination was binding on the states, the dual sovereign doctrine lost its theoretical justification. See, Comment, *Self-Incrimination and the*

State: Restriking the Balance, 73 Yale L.J. 1491, 1493 (1964). Therefore, in *Murphy*, the court was faced with the problem of fashioning an immunity rule for the *interjurisdictional* situation which would accommodate those practical considerations of federalism which still remained:

> "Since a state cannot insulate a witness from foreign prosecution by a grant of immunity, the complete abandonment of the dual sovereignty doctrine would prohibit states from constitutionally compelling witnesses to give testimony which might incriminate under laws of other jurisdictions. This could well represent a serious limitation on the state's ability to investigate." Comment, *Self-Incrimination and the State: Restriking the Balance, supra* at 1493.

As Justice White noted in his concurring opinion,

> Whenever access to important testimony is barred by possible state prosecution, the State can, at its option, remove the impediment by a grant of immunity; but if the witness is faced with prosecution by the Federal Government, the State is wholly powerless to extend immunity from prosecution under federal law in order to compel the testimony. *Murphy* v. *Waterfront Commission, supra* at 97.

The problem also remained of allowing the questioning jurisdiction to make prosecutorial decisions for the non-questioning jurisdiction. As has been pointed out:

> . . . A sovereign can make its own self-imposed choice as to whether it is willing to forego subsequent prosecution in exchange for the information obtained. But it is wrong both in principle and practice to permit

one jurisdiction to make this decision for another, which could be the result if complete 'immunity from prosecution' in all jurisdictions were the constitutional result of one jurisdiction's compulsion of testimony. The entire basis of the federal system rests upon the sovereignty theory—that each sovereign should be free to function without restrictions imposed by another sovereign. Note, *In re Koota: The Scope of Immunity Statutes, supra* at 660-661 (1966).

In *Murphy* the Court accommodated these important state and federal interests by fashioning a rule which barred subsequent use in another jurisdiction of the compelled testimony or its fruits. By so doing, the Court was able to preserve the first jurisdiction's right to secure testimony in exchange for a grant of transactional immunity. It also protected the interests of the secondary jurisdiction by allowing it to make its own determination as to whether to prosecute the witness on the basis of independently obtained evidence. The *Murphy* rule, then, governs only interjurisdictional situations by leaving the witness and the noninquiring jurisdiction in the same position as if the witness had never testified. See *Murphy* v. *Waterfront Commission, supra* at 79, 101. *Adams* v. *Maryland*, 347 U.S. 179, 185 (concurring opinion of Justice Jackson). The witness is not subjected to having his testimony or its fruits used by the jurisdiction which did not grant him immunity—a windfall for that jurisdiction—and protects him from being whipsawed between jurisdictions. Furthermore, the nonquestioning jurisdiction is not bound by the decision of the other that it is more valuable to gain information from the witness than to prosecute him.

Consequently, *Murphy* did not *sub silentio* overrule *Counselman* or set forth a rule for intrajurisdictional cases. *In Re Korman*, —— F.2d ——, 39 L.W. 2681 (7th Cir. 5/20/71) (holding *Counselman* is still the rule and invalidating the new federal immunity statute for failing to provide transactional immunity). As has been discussed previously, the rule in *Counselman*, that transactional immunity is required as between the questioning jurisdiction and the witness is of continuing vitality.

Moreover, since *Murphy*, this Court has reaffirmed the *Counselman* rule in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 80 (1965), specifically noting that a federal immunity statute was invalid because it did not provide "absolute immunity against future prosecution for the offense to which the question relates." See also, *Stevens* v. *Marks*, 383 U.S. 234, 244-245, 249-50 (1965) (where this Court found no need to reconsider the *Counselman* rule in regard to the inquiring sovereign).

Accordingly, *Murphy* applies only to situations involving more than one jurisdiction and has no applicability to cases involving only one sovereign:

> *Murphy*, consequently, broadened rather than restricted the protection of the Fifth Amendment's privilege against self-incrimination. The reason the Court extended the protection of the privilege in a cross-jurisdiction situation only to use of the compelled testimony and its fruits and not to prosecution immunity was out of considerations of federalism. Thus it minimized interference with the law enforcement prerogatives of the non-questioning jurisdiction." *In the Matter of the Grand Jury Testimony of Joann Kinoy*, —— F.S. ——, 39 L.W. 2427 (S.D.N.Y. 1971).

There is nothing inconsistent between the *Murphy* exclusionary rule applicable to the intergovernmental situation and the continued vitality of the transactional immunity rule to govern the parameters and the relationship between the witness and the inquiring sovereign. The latter situation is, of course, the one involved here.

The transactional immunity rule reflects a constitutional compromise between the rights of the witness and the law enforcement and investigatory needs of the state. To the extent that the *Murphy* rule suggests that "use and fruits" immunity is the appropriate standard with regard to a non-inquiring secondary sovereign, it is an exception to the transactional immunity rule, an exception based on the realities of federalism and on the realization that although one state must grant transactional immunity, that grant should not bind other states or the federal government. Consequently, if multi-jurisdictional transactional immunity were required, no state could offer it, and thus no state would be able to inquire into incriminating areas. The *Murphy* rule was an understandable reconciliation of the interests involved. And, of course, *Murphy* was an extension of the privilege because it overruled the decisions which held that *no* immunity was required as against the non-inquiring sovereign.

It would be anomalous, indeed, to hold that a decision which extended the availability of the privilege contained the seeds of its destruction. See, *In Re Korman, supra; In the Matter of the Grand Jury Testimony of Joann Kinoy, supra.* It partakes of throwing out the baby with the bath water to suggest that because *Murphy* did not require that transactional immunity be granted by all sover-

eigns, then transactional immunity need not be conferred by any sovereign, even the one that compels the witness to yield his right to remain silent. In the *Murphy* situation, the non-inquiring sovereign has not compelled the witness to reveal criminal activities and to suffer the criminal and other consequences of such a confession, and, so long as an exclusionary rule applies, it can arguably be said that the witness and the non-inquiring sovereign are in the same position as before the question was asked. As Justice Brennan has noted, that is simply not true as between the witness and the sovereign that compels him to speak,

> The individual has been compelled to incriminate himself, and if he is granted only use immunity, compelled to do so in matters for which he may ultimately be prosecuted. Even from the standpoint of the State it clearly is not in the same position that it would have been had it not compelled the witness to testify. It has obviously obtained information, which may help it to pursue its general investigation, as well as its specific investigation of others. Whether that information will enable the investigation to generate enough steam and continue long enough to produce "independent" evidence incriminating the individual originally compelled to testify is an open question. In short, use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality. *Piccirillo* v. *New York*, 27 L. Ed. 2d at 608-09.

This Court has recognized since *Counselman* that the minimally fair bargain between the inquiring government and the witness is the one embodied in the requirement of

transactional immunity. The individual surrenders his right to remain silent and is forced to reveal criminal conduct. In exchange for withdrawing the constitutional privilege and acquiring evidence, the state is obligated to grant the witness immunity from prosecution for the transaction about which he testified. Anything less than an immunity from prosecution—a pardon—does not comport with the wording, history or policies of the privilege.

Requiring transactional immunity is fair in the practical sense as well. As Justice Brennan has noted, the "uncertainties of the fact-finding process argue strongly against 'use' immunity and in favor of transactional immunity." *Piccirillo* v. *New York, supra* at 609; see also *Murphy* v. *Waterfront Commission, supra* at 703 (concurring opinion of Justice White). Anything less than transactional immunity places a burden on the witness to attempt to insure that any subsequent prosecution relating to the matters testified to was, in fact, based on an independent source. See *In the Matter of the Grand Jury Testimony of Joann Kinoy, supra.* Transactional immunity provides the kind of certainty to which the witness, as well as the court, should be entitled:

> . . . the State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive its subtleties. A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him. *Stevens* v. *Marks, supra* at 246.

Transactional immunity has been held to be a part of our "constitutional fabric" since *Counselman*. It has been the rule in almost all the states. See Appendix B to Petitioner's Brief in *Piccirillo* v. *New York, supra*. Until very recently, it has been the standard embodied in over forty federal immunity provisions. The minimally acceptable constitutional rule was succinctly stated by Justice Brennan,

> ". . . the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction which compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York, supra* at 605.

CONCLUSION

For the reasons set forth above, the decisions below should be reversed.

Respectfully submitted,

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* Counsel for *amicus curiae* wish to express their appreciation to Arthur N. Eisenberg for his invaluable assistance in the preparation of this brief.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-7

Albert Sarno and Chris Cardi, Petitioners, v. Illinois Crime Investigating Commission. | On Writ of Certiorari to the Supreme Court of Illinois.

[May 22, 1972]

PER CURIAM.

Petitioners were ordered to testify before the Illinois Crime Investigating Commission under a grant of immunity conferred pursuant to Ill. Rev. Stat. c. 38, § 203—14 (1969). The occasion for granting the writ in this case was to consider whether Illinois must demonstrate to petitioners, prior to an adjudication for contempt for refusal to answer the Commission's questions, that immunity as broad in scope as the protection of the privilege against self-incrimination is available and applicable to them. 401 U. S. 935 (1971). The writ was granted in light of petitioners' claim that the statute did not provide complete transactional immunity. On the same day that the writ was granted, probable jurisdiction was noted in *Zicarelli* v. *New Jersey State Commission of Investigation*, 401 U. S. 933 (1971), to resolve the question whether a State can compel testimony from an unwilling witness, who invokes the privilege against self-incrimination, by granting immunity from use and derivative use of the compelled testimony, or whether transactional immunity is required.

We held today in *Kastigar* v. *United States*, *ante*, —, and in *Zicarelli* v. *New Jersey State Commission of In-*

vestigation, ante, —, that testimony may be compelled from an unwilling witness over a claim of the privilege against self-incrimination by a grant of use and derivative use immunity. The premise of petitioners' arguments is that transactional immunity is required. They say that Illinois failed to demonstrate satisfactorily that transactional immunity was provided, but they do not contend that the Illinois immunity statute affords protection less comprehensive than use and derivative use immunity. Respondent asserts that the statute affords complete transactional immunity, reflecting a long-standing Illinois policy of providing immunity greater than that required by the United States Constitution. Since neither party contends that the scope of the immunity provided by the Illinois statute falls below the constitutional requirement set forth in *Kastigar,* we conclude that any uncertainty regarding the scope of protection in excess of the constitutional requirement should best be left to the courts of Illinois. Accordingly, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar, ante,* —.

MR. JUSTICE MARSHALL dissents for the reasons stated in his dissenting opinion in *Kastigar, ante,* —.